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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 453

MORRISON T. WADE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE RECORDER'S COURT OF THE CITY OF DETROIT AND BRIEF IN SUPPORT THEREOF

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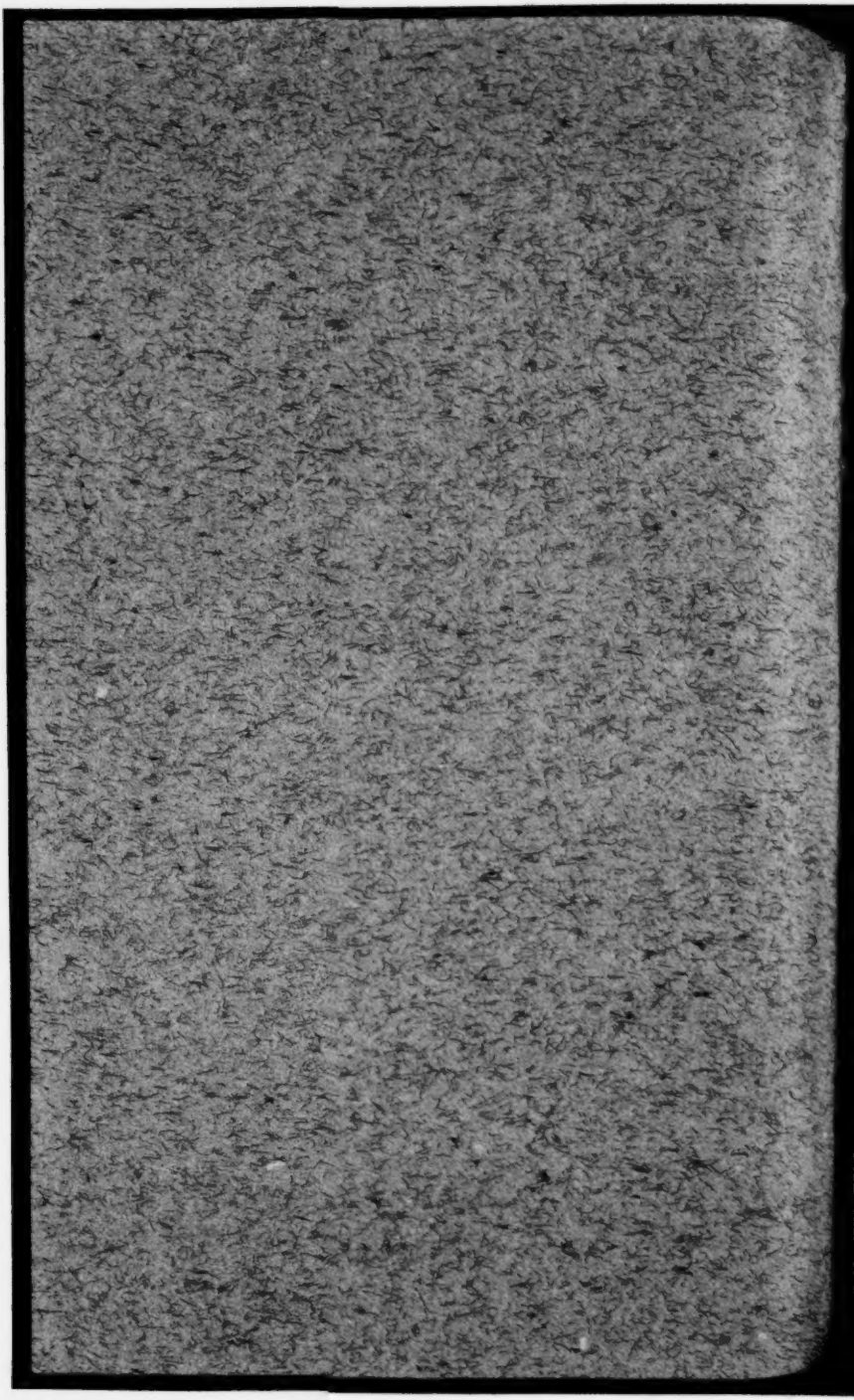

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PETITION FOR WRIT OF CERTIORARI TO THE RECORDER'S COURT OF THE CITY OF DETROIT AND BRIEF IN SUPPORT THEREOF.

(Numbers in parentheses are references to pages in the printed transcript of record, unless otherwise noted.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT: Your Petitioner, Morrison T. Wade, a citizen of the State of Michigan, hereby respectfully petitions for review upon Writ of Certiorari, of a decision and judgment of the Recorder's Court of the City of Detroit, and respectfully shows:

A

Summary Statement of Matter Involved

This case challenges the power of the judges of the State of Michigan to act as so-called one man grand juries, and their power to find persons guilty of Contempt of Court while acting as one man grand juries.

In the instant case, the Recorder's Court of the City of Detroit is the court of last resort, by reason of the fact that the Petitioner had no right to an appeal to the Supreme Court of the State of Michigan as a matter of course; that he made application for leave to appeal to the Supreme Court of the State of Michigan (1-4), which was denied by the Court on September 9th, 1948, without opinion (58).

That on or about the 3d day of February, 1948, James N. McNally, Prosecuting Attorney of Wayne County, and Eugene F. Black, Attorney General of the State of Michigan, filed a petition in the Recorder's Court for the City of Detroit, for a "one-man grand jury" to investigate the commission of certain crimes in the City of Detroit, in pursuance of Section 17217, *et seq.*, of the Compiled Laws of the State of Michigan for 1929 (being Sec. 28.943 *et seq.* of the Michigan Statutes Annotated) (9-11); that said petition was granted and the Honorable Gerald W. Groat was appointed to conduct the so-called one-man grand jury investigation.

That while the petition for a grand jury was a blanket petition, naming no persons or organizations, it subsequently developed that the Society of Good Neighbors, a Michigan non-profit corporation, was to be the main object of the grand jury investigation; consequently, officers, members of the board of directors, employees, charity recipients and all and sundry persons having anything to do with the Society of Good Neighbors were called as witnesses by the one-man grand jury and its attaches.

Petitioner was and is the founder and managing director of the Society of Good Neighbors and is also the treasurer of Holiday House, Inc., a Michigan corporation organized in April, 1946 for the purpose of dealing in flowers, plants, horticultural products and to operate stores for the sale of flowers, gifts and antiques and to deal in personal property at retail and wholesale and to manufacture personal property; and was called as a witness before the grand jury and appeared upon several occasions.

That most of the original books of entry and records of the Society of Good Neighbors were delivered to the attaches of the "grand jury" on or about February 6, 1948, and are still in the possession of the "grand jury."

Petitioner further says that on or about May 5, 1948, a "subpoena duces tecum" was issued out of the Recorder's Court for the City of Detroit, directing Morrison T. Wade to appear before the Hon. Gerald W. Groat, sitting as a "one-man investigation", Exhibit 2 (12). The subpoena directed Wade to bring before Judge Groat records of other corporations, Holiday House, Inc., Recreation, Inc., Thompson-Wade Corporation, and Chase-Wade Boat Company, of which corporations he was an officer.

Petitioner further says that he appeared before Judge Gerald W. Groat, sitting as a one man grand jury in the Recorder's Court of the City of Detroit, on the 6th day of May, 1948 at 9:30 A. M., but did not bring any records with him; that some of the records named in the subpoena had previously been delivered, but the following named in the subpoena had not been brought before Judge Groat: Accounts receivable and payable sheets, sales invoices, purchase invoices, book of returns, sales tax stubs, income tax return copy, sales journal and petty cash vouchers.

That on or about May 7, 1948, Edwin W. Scott, an Assistant Prosecuting Attorney for the County of Wayne,

filed a petition in the Recorder's Court for the City of Detroit, *in re* Morrison T. Wade, Miscellaneous No. 44945, praying that an Order to Show Cause issue requiring the said Morrison T. Wade to appear and answer as to why he should not be held in contempt of court and punished therefor. An Order to Show Cause was issued in pursuance of said petition by the Hon. Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit (13-18), who was also acting as the one man grand jury and investigation.

Petitioner further shows that he filed a motion to dismiss the Order to Show Cause, Exhibit 5 (18-23), which motion came on to be heard before Judge Groat, also acting as the one man grand jury, who denied the motion, and proceeded to the hearing on the Order to Show Cause for contempt. The Petition for the Order to Show Cause shows it was based upon excerpts taken from the so-called one-man grand jury proceedings and did not cover all of the testimony of the respondent when he appeared in answer to said subpoena; that a full transcript was not made available and that the excerpts taken out of the context were selected by the Prosecuting Attorney to give the indicia of contumacy; that the trial court ruled that the records of the other corporations were necessary for the further inquiry into the grand jury matter without permitting the petitioner to introduce evidence as to the materiality of the said books and records.

The court stated that the Petitioner would be permitted to bring in the records and said: "I don't know; I know what has happened in this grand jury and I have heard all the testimony and these records will have to be brought in or he will be held in contempt of court. That is all there is to it" (51).

Petitioner stated in open court that he was perfectly willing to turn over all the books and records of all the

corporations even though he feared that the attaches of the grand jury would be calling on their creditors. The trial court stated: "Now, you can strike that from the evidence, the latter part of that statement. It is not the intention of this Court to do anything but what is proper. If you mention my name as the Grand Jury, I think you would be in contempt for saying that. The attaches of the Grand Jury are working directly under me and I am held responsible for what they do. Some of it is under my direction. I don't know what they tell the public when they get out, but I have talked to a lot of these witnesses personally" (52).

Petitioner agreed to bring in the books and records, whereupon the Court said (53): "You are not through with the contempt," and "All right I will adjourn this case to 9:30 tomorrow morning, and I expect all the records in here. Then we will continue with the other part of the contempt" (53).

The Record shows that counsel for respondent requested an opportunity to put in proofs and that the trial court said (53): "Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't, they don't testify. Nine thirty tomorrow morning. Have all the records here. That is your statement, I understand, under oath?"

Judge Groat, Judge of the Recorder's Court of the City of Detroit, acting as a one-man grand jury, found the Petitioner guilty of contempt notwithstanding his production of the books and records, and said (56): "You have acted throughout with studied contempt of the authority of this Court and of its process. You have contumaciously proclaimed your right to dictate to the Court the conditions

upon which the Court may inspect the said books and records for the purposes of the inquiry being conducted by the Court. You have failed to obey the Court order and have announced that you will not obey.

"In addition, you forbade Oliver Fluke, the bookkeeper for these organizations, to produce these records, although, according to your testimony yesterday, some of these records could not be produced yesterday because he has the only keys to the vaults or places of safekeeping in which they were kept.

"These actions on your part were contumacious and you are in contempt of court for the following reasons:

"(1) Because by your actions you have delayed for more than a month the proceedings before this Grand Jury;

"(2) Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;

"(3) Because you refused to obey the order of this Court.

"In your testimony yesterday you offered to produce the records desired and today you have produced them. By these actions you have purged yourself partially but not wholly of this contempt. This Court cannot permit witnesses to dictate when and under what circumstances they shall obey its processes.

"I find you guilty of contempt of court, and sentence you to pay a fine of $100, or serve thirty days in the Wayne County jail."

Petitioner further shows that the excessive zeal of the so-called "one-man grand jury" is further demonstrated by the fact that contempt proceedings were instituted by the Hon. Gerald W. Groat against one Paul Westerkamp, a witness called to testify in the investigation against the Society of Good Neighbors, for his refusal to disclose privileged communications between himself and his counsel;

that the Detroit Bar Association petitioned for the right to intervene in said proceeding on behalf of said witness, which was granted; that after arguments of counsel and briefs filed by counsel for the witness and the Detroit Bar Association, the trial court reluctantly dismissed the contempt proceedings against said Paul Westerkamp.

B

Statement as to Jurisdiction

It is respectfully urged that the conviction of petitioner of contempt of court without his being permitted to have witnesses in his behalf amounts to no proper hearing and his conviction of contempt of court after having produced the books and records required was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

Section 237(b) of the Judicial Code as amended (Sec. 344(b), Title 28, Judicial Code and Judiciary, U. S. Code Ann.), provides:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination * * *, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution. * * *"

Re "highest court" of a State, see:
Jamison v. *Texas*, 318 U. S. 413, 87 L. Ed. 869;
Largent v. *Texas*, 318 U. S. 418, 87 L. Ed. 873;
Minneapolis, St. P. Etc. v. *Rock*, 279 U. S. 410, 73 L. Ed. 766.

Petitioner respectfully submits that Sections 17217 and 17218, Compiled Laws of the State of Michigan (Sec. 28.943 and 28.944 Michigan Statutes Annotated), (the so-called one man Grand Jury statutes) which provide as follows:

"Sec. 28.943 Proceedings before trial; investigation of suspected offenses by judge or justice; summoning witnesses, inquiry, compensation.) SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. (C. L. '29, Sec. 17217.)

"Sec. 28.944 Same; apprehension of suspected person; removal of public officers, procedure; disclosure of statement.) SEC. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect

any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding, in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors. (C. L. '29, Sec. 17218)."

are in violation of Section 4, Article IV of the Constitution of the United States, which provides:

"The United States shall guarantee to every State in this Union a republican form of government,"

and are in violation of the 14th Amendment to the Constitution of the United States, which provides: (Section 1)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C

Questions Presented

The following questions are presented:

(1) Is the so-called one-man grand jury act of Michigan (Sec. 17217 et seq. of the Compiled Laws of the State of Michigan for 1929), a violation of the 14th Amendment to the Constitution of the United States?

(2) Does the so-called one-man grand jury act deny a citizen the Republican form of government?

(3) Are the proceedings of a so-called one-man grand jury a denial of due process and the equal protection of the laws?

(4) Is it a denial of due process to convict a person of contempt of court for alleged misconduct before a judge acting as a secret one-man grand jury?

(5) Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court upon an incomplete record made up of exerpts taken from testimony before a "one man" grand jury, without a complete record and without permitting him to testify and have witnesses testify in his behalf?

D

Rulings of the Michigan Courts on the Questions Presented

The foregoing questions were contained in respondent's motion to dismiss the Order to Show Cause before the Honorable Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit, who was also acting as the one man grand jury. (18-23) The motion was denied.

Petitioner filed application for leave to appeal to the Supreme Court of the State of Michigan, setting forth the above questions as well as others, and the Court denied the petitioner's application for leave to appeal without any opinion. (58)

E

Reasons for Allowance of the Writ

(a) Petitioner was found guilty of contempt of court based upon allegedly contumacious behavior while appearing as a witness before the Judge acting in secret proceedings as a one man grand jury.

(b) Section 17219 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) which provides:

> "Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (C. L. '29, Sec. 17219.)"

is the only Statute of the State of Michigan defining contempt of a witness before a grand jury; petitioner purged himself of the alleged contempt for failure to produce books and records by bringing in the books and records demanded by the one man grand jury, notwithstanding which he was adjudged guilty of "contempt of court."

(c) Because the Judge, sitting as a secret one man grand jury is an inquisitorial body, and at the same time assumes to exercise the functions of a trial court and subsequently sits also as the Judge hearing the order to Show Cause on an alleged contempt before the secret one man grand jury, thus acting in a dual capacity.

(d) Because appeals from a conviction of contempt as in the case at bar are not a matter of right but rest in the discretion of the Supreme Court of the State of Michigan, which court has established the practice, as in the case at bar, of permitting the secret one man grand jury to act in a dual capacity and to predicate a conviction upon a partial record made up of selected excerpts from the proceedings before the so-called one man grand jury of just so much of the witness' testimony as the grand juror sees fit to disclose, and denying to accused access to and use of full transcript.

(e) Because Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.943 and 28.944 Michigan Statutes Annotated) by virtue of which authority the so-called one man grand jury operates, are in violation of the Fourteenth Amendment to the Constitution of the United States and deprive petitioner of his liberty and property without due process of law and are a denial to petitioner of the equal protection of the laws.

(f) Because the so-called one-man grand jury is a denial of the Republican form of government.

(g) Because the proceedings of the so-called one man grand jury in the case at bar is a clear violation of the

principles enunciated by this Court in the case of *In Re Oliver*, 92 L. Ed. 491 (decided May 8, 1948.)

(h) Because the Michigan courts, including the Michigan Supreme Court, have consistently refused to recognize the constitutional violations by the so-called one man grand jury proceedings, and proceed upon the assumption that "the one man grand jury can do no wrong."

(i) Because the protection ordained by the Constitution of the United States thus becomes meaningless for the citizens of the State of Michigan and particularly your petitioner, unless this Court intercedes in this Michigan situation.

Prayer

WHEREFORE your petitioner prays that a Writ of Certiorari issue out of and under the seal of this Court directed to the Recorder's Court of the City of Detroit, commanding such court to certify and send to this Court a full and complete transcript of the record and proceedings of said cause to the end that said cause be reviewed and determined by this Court; that the judgment of the said Recorder's Court of the City of Detroit be reversed and petitioner be discharged, and that Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929, creating the one man grand jury be found a denial to the citizens of the State of Michigan of a Republican form of government and repugnant to the 14th Amendment to the Constitution of the United States.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE STATE OF MICHIGAN

1

Is the so-called one-man grand jury act of Michigan (Sec. 17217 et seq. of the Compiled Laws of the State of Michigan for 1929), a Violation of the 14th Amendment to the Constitution of the United States?

The so-called one-man grand jury law, being sections 28.943 and 28.944 of the Michigan Statutes Annotated, is unconstitutional in that it violates the 14th Amendment to the United States Constitution, which states, among other matters:

> "No person shall be deprived of his life, liberty or property without due process of law, and no person shall be denied the equal protection of the laws."

In the first instance, the proceeding of the so-called one-man grand jury is not a court proceeding. It is a grand jury under the statute, and the judge acting as the grand jury does not function as a judge, but as a grand juror. This is clearly indicated by the recent decision of this Court in the case of *In Re Oliver,* (No. 215, October Term, 1947) wherein Mr. Justice Black said:

> "Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge

> the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge, even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case."

A general statement of the law in reference to what constitutes denial of the equal protection of the laws and due process which petitioner contends is applicable in the case at bar, is contained in the decision of Mr. Justice Douglas in the case of *Screws* v. *United States*, 325 U. S. 91, 89 L. Ed. 1495, on page 1499.

2

Does the so-called one-man grand jury act deny a citizen the republican form of government?

The so-called one-man grand jury is in violation of Section 4 of Article IV of the Constitution of the United States guaranteeing a republican form of government to all the States and the citizens thereof.

Article IV, Section 4, of the Constitution of the United States, reads as follows:

> "The United States shall guarantee to every state in this Union a republican form of government" • • •

This provision has been interpreted by the Federal Courts adversely to the effort to combine duties of the various departments of Government:

> *United States* v. *Ferreira*, 13 How. 40, 44, 14 L. Ed. 42;
> *Gordon* v. *United States*, 117 U. S. 697;

Matter of Sanborn, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429;

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 481, 14 S. Ct. 1125, 38 L. Ed. 49;

Muskrat v. *United States*, 219 U. S. 346, 353, 31 S. Ct. 250, 55 L. Ed. 245;

Tutun v. *United States*, 270 U. S. 568, 576, 46 S. Ct. 425, 70 L. Ed. 738;

Liberty Warehouse Co. v. *Grannis*, 273 U. S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

In the case of *In Re Richardson*, 247 New York 401 166 N. E. 655, Justice Cardozo, speaking for the Appellate Court, said:

> "The function of the judge is to determine controversies between litigants * * *. They are not adjuncts or advisers, much less investigating instruments of other agencies of government." * * *

Justice Cardozo speaking for the Court, says:

> "The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a

case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court. * * *"

The Appellate Court held unconstitutional the statute under which the trial court sought to act as an inquisitor.

The Michigan Supreme Court has recognized the separation of duties of the various departments. It has particularly recognized the fact that the judicial function is separate and distinct from administrative and other departments, in the very recent case of *Local 170, Transport Workers Union of America* v. *Paul V. Gadola, Circuit Judge,* decided September 8th, 1948, 322 Mich. 332. In this case the question involved the interpretation of the Bonine-Tripp Act, No. 318 of the Public Acts of the State of Michigan for 1947, which provided for compulsory arbitration in the event of a labor-management dispute arising in certain cases. The chairman of the Board under the law was to be a circuit judge.

The Supreme Court of the State of Michigan held the law unconstitutional and Mr. Chief Justice Bushnell in his opinion said:

"We now consider the constitutional question raised in connection with the claimed violation of the fundamental principles of division of the powers of State government as preserved by Art. 4, Sec. 2 and Art. 7, Sec. 9 of the Constitution of 1908:

" 'No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.' * * *

"Defendants' answer to plaintiffs' attack is as follows:

" '(1st) a circuit judge who becomes chairman of an arbitration board established by Sec. 13, as amended,

for the purpose of settling a single labor dispute, involving the public interests and welfare, acts in his individual rather than in his judicial capacity; he does not as a person belonging to one department exercise powers properly belonging to another; • • •'

"If the act were so drafted that any person might be appointed as chairman of the board by executive authority, and a circuit judge were thus appointed, he might possibly be said to be acting in his individual rather than in his judicial capacity; *but here he only acts because he is a circuit judge*, and then only on the call of the presiding circuit judge and without additional compensation to his judicial salary.

"Defendants' argument thus ignores the plain constitutional language that 'no person belonging to one department shall exercise the powers properly belonging to another.'

"The act here under consideration adds a new duty not judicial in nature to the office of circuit judge. Although in In Re Slattery, 310 Mich. 458, 463, we did not feel bound by In the Matter of Richardson, 247 N. Y. 401 (160 NE 655), as applied to a circuit judge acting as a one-man grand juror because he was acting in a judicial capacity, we cannot escape the reasoning of Mr. Justice Cardozo when applied to the requirements of the act in question. • • •

"Important as industrial peace may be, particularly in the field of public utilities and hospitals, the absolute independence of the judiciary from executive or legislative control is of transcendant import. Our form of government cannot be maintained without an independent judiciary; and, if we as a people submit to a mingling of government power, we then accept in fact that which we most abhor—one-man autocratic control—and the constitutional safeguards of our Nation and State would then be abrogated. • • •

"The opinions of this Court indicate that the constitutional inhibition in question is to be strictly applied. See Houseman *v.* Montgomery, 58 Mich. 364;

Manistee *v.* Harley, 79 Mich. 238; People *v.* Dickerson, 164 Mich. 148; Anway *v.* Grand Rapids Ry. Co., 211 Mich. 592; and Koeper *v.* Detroit Street Railway Commission, 222 Mich. 464. See, also, In re Application of Consolidated Freight Co., 265 Mich. 340. * * *

"The following observations are applicable to the present situation:

" ' No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' The Federalist No. 47.'

" 'For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.' (Quoted from Jefferson on Notes on the State of Virginia. The Federalist No. 48.'

" 'The complete independence of the Courts of Justice is peculiarly essential in a limited Constitution.' The Federalist No. 78.'

"Defendant, Circuit Judge Paul V. Gadola, may not act as an aribtrator in this instance because of the limitations imposed on him by the cited sections of the State Constitution. * * *"

The opinion was concurred in by the other Justices and Mr. Justice Boyles in concurring said:

"I concur in the conclusion of Chief Justice Bushnell on the sole ground that the designation of a circuit judge to act as a member of the arbitration board with its power to make a binding determination of the issues involved in the labor dispute makes the act unconstitu-

tional and void. The attempt to confer such administrative powers upon a circuit judge is inseparably involved in the entire act, inasmuch as the act is meaningless without the appointment of the arbitration board. It is an attempt to confer upon a judicial officer nonjudicial powers and duties, in violation of the State Constitution (Art. 4, Sec. 2; Art. 7, Sec. 9). For the reasons stated herein, I concur in issuing the writ of prohibition, without costs."

3

Are the proceedings of a so-called one-man grand jury a denial of due process and the equal protection of the laws?

(a) In the so-called one-man grand jury, the grand juror is attempting to function both in a judicial capacity and as a grand juror which is a non-judicial function.

In the case of *Sutherland* v. *Governor*, 29 Michigan 320, Mr. Justice Cooley, on page 323, said:

> "However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever;" • • •

and on pages 324 and 325:

> "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One

makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

* * * * * * *

"The Legislature in prescribing rules for the courts, is acting within its proper province in making laws, while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal."

As early as 1811 Chancellor Kent remarked of the separation of governmental powers:

"No maximum has been more universally received and cherished as a vital principle of freedom." *Dash* v. *Van Kleeck*. 7 Johns, 477, 5 Am. Dec. 291, 313.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377, it is said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand de-

> partments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress. * * * "

The first paragraph of the above was quoted with approval by Justice White, in *McCray* v. *U. S.*, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. 769.

In *Searle* v. *Hensen*, 118 Nebr. 835, 226 N. W. 464, 69 A. L. R. 257, the Court observes:

> "The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu that 'there can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator; *Were it joined to the executive power the judge* might behave with all the violence of an oppressor.' "

In *O'Donoghue* v. *U. S.*, 516, 77 L. Ed. 1356, 53 S. Ct. 740, this Court held:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands*, 277 U. S. 189, 201, 72 L. Ed. 845, 849, 48 S. Ct. 480, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.
>
> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' 1 *Andrews, Works of James Wilson* (1896), p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling

> influence in the administration of their respective powers.' 1 *Story, Const.*, 4th ed. par. 530. To the same effect, *The Federalist* (Madison), No. 48. And see *Massachusetts* v. *Mellon*, 262 U. S. 447, 448, 67 L. Ed. 1078, 1085, 43 S. Ct. 597."

Under the division of powers the enforcement of the law has been entrusted to the Executive Department. Such enforcement includes the investigation of crime, the detection of criminals and the presentation of the facts respecting crimes before the Courts. The machinery to accomplish this purpose provided by the Executive department includes police departments and constables in cities, sheriffs in counties, state police operating statewide, prosecuting attorneys in each county, and an attorney general having general supervision over the latter.

In *People* v. *Dickerson*, 164 Mich. 148, the Supreme Court had occasion to say:

> "From the foundation of our government, it has been the duty of the prosecuting attorney to prepare the case for the people. He, and he alone, must determine what witnesses shall be sworn to establish the case he presents. In case of disability or the necessity for assistance, the statute provides for substitution or assistance, as the case may be, upon proper application, but the principle of responsibility remains the same, though the service may, by reason of necessity, be temporarily performed by one clothed with statutory authority. See *Wigmore on Evidence*, 1286 and 2483. We think it clear that the preparation for and conduct of the trial on behalf of the people are acts executive and administrative in character. Under our Constitution, which jealously separates the powers of government into legislative, executive, and judicial departments, the powers and duties properly belonging to one department cannot by statutory enactment be granted to or imposed upon another department." (citing cases)

(b) A judge of the Recorder's Court has no jurisdiction under the laws of the State of Michigan to initiate criminal proceedings.

Section 17135 of the Compiled Laws of the State of Michigan for 1929 (Section 28.860 Michigan Statutes Annotated) provides:

> "For the apprehension of persons charged with offenses, excepting such offenses as are cognizable by justices of the peace, the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes and circuit court commissioners, mayors and recorders of cities and all justices of the peace, shall have power to issue processes to carry into effect the provisions of this chapter: Provided, however, That it shall not be lawful for any of the above named public officials to issue warrants in any criminal cases, except where warrants are requested by members of the department of public safety for traffic or motor vehicle violations, until an order in writing allowing the same is filed with such public officials and signed by the prosecuting attorney for the county, or unless security for costs shall have been filed with said public officials."

Section 16301 Compiled Laws of the State of Michigan for 1929 (Section 27.3562 Michigan Statutes Annotated) provides:

> "All indictments for offenses committed within the limits of the city of Detroit, which may be found and presented to the circuit court for the county of Wayne, by the grand jury of said county, shall be forthwith certified and transmitted by the clerk of said circuit court to said recorder's court, and thereupon said recorder's court shall have as full and complete jurisdiction of said indictments as if the same had been originally presented to said recorder's court, and shall have full power to take all further proceedings thereon."

Section 16302 Compiled Laws of the State of Michigan for 1929 (Section 27.3563 Michigan Statutes Annotated) provides:

> "Except as provided in the preceding section, prosecutions in the recorder's court for crimes, misdemeanors, and offenses arising under the laws of this state, and within the jurisdiction of said court, shall be by information as provided for in chapter two hundred and sixty one (261) of the compiled laws of eighteen hundred and seventy one (1871) Provided, That in all cases where an information shall be filed against any person held for trial before said court, it shall not be necessary that said information be verified by oath."

Chapter 261, Compiled Laws of 1871, provided for in Section 16302 Compiled Laws for 1929, *supra,* was repealed by Act 175 of the Public Acts of 1927, which is the Code of Criminal Procedure. The Code of Criminal Procedure says:

> "The word 'indict' includes information, presentment, complaint, warrant, and any other formal written accusations."

(Section 17118 C. L. 1929; 28.843 Michigan Statutes Annotated).

There is nothing in the statute creating and outlining the duties of the Recorder's Court of the City of Detroit which grants it any authority to initiate criminal proceedings.

Section 17217 Compiled Laws of the State of Michigan for 1929 (Sec. 28.943 Michigan Statutes Annotated) provides:

> "Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime,

offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings."

Section 17218 Compiled Laws of the State of Michigan for 1929 (Sec. 28.944 Michigan Statutes Annotated) provides:

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry, the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for

> removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

The preceding two sections are the authority under which the so-called one-man Grand Jury is being conducted by the Honorable Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit.

The Michigan Supreme Court has previously held that the proceedings for the discovery of crime brought under Section 17217 *et seq.* of the Compiled Laws of the State of Michigan for 1929 do not come within the grant of exclusive jurisdiction to the Recorder's Court.

In the case of *People* v. *Ewald,* 302 Mich. 31, Mr. Justice Sharpe in his opinion gives a resume of the statutory provisions hereinabove referred to, and on page 39, said:

> "The proceedings for the discovery of crime are not 'prosecutions and proceedings * * * for crimes' within the meaning of the recorder's court jurisdiction statute. The circuit Judge conducting the investigation had the authority to cause apprehension of defendant by proper process under the general code of criminal procedure."

and on page 40:

> "Under 3 Comp. Laws 1929, § 16301 (Stat. Ann. § 27.3562), it is provided that indictments for offenses committed within the limits of the city of Detroit which may be found and presented to the circuit court by the grand jury shall be certified and transmitted to

the recorder's court. The above statute also provides that the recorder's court shall then have full and complete jurisdiction and power to take all further proceedings thereon. *It is our conclusion that the exclusiveness of jurisdiction of the recorder's court does not extend to the initiatory step in the institution of proceedings, but merely to matters subsequent thereto connected with bringing an offender to trial; and that the process was properly returnable to the recorder's court for the city of Detroit.*"

Petitioner in the case at bar, in his motion to dismiss, gave as reason XVIII the fact that the Honorable Gerald W. Groat sitting as a one-man grand jury did not take the oath as a grand juror prior to commencing the work as a one-man grand jury. This has not been denied.

Section 17218 Compiled Laws of the State of Michigan for 1929 (Sec. 28.944 Michigan Statutes Annotated) provides, among other things:

> "And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

This provision of the statute is mandatory. It requires that all of the persons including the judge be governed by the provisions of the law relative to grand jurors.

Section 17223 Compiled Laws of the State of Michigan for 1929 (Sec. 28.949 Michigan Statutes Annotated) which is the statute relative to the oath of grand jurors, provides the oath as follows:

> "You as grand jurors of this inquest, for the body of this county of . . . do solemnly swear that you will diligently inquiry and true presentment make of all

> such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor or affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

This is the only oath provided for by the statute which calls for secrecy. There is no other statute pertaining to the grand jury having such a provision; therefore, the provision in Section 17218 C. L. 1929, being Sec. 28.944, Michigan Statutes Annotated, can have reference only to the foregoing oath of secrecy.

In the case of *In re Oliver, supra*, this Court said:

> "Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy." (citing cases)

Certainly the Legislature must have intended this sentence in the statute to have some meaning. Certainly it would not have added the justice and judge in the enumeration of persons to be governed by the provisions of the law relative to grand jurors unless it had so intended. Certainly the Legislature must have been mindful of the fact that all public officials take their constitutional oaths of office, but there are other oaths that are required when officials act in capacities requiring special oaths, such as a grand jury.

4

Is it a denial of due process to convict a person of contempt of court for alleged misconduct before a judge acting as a secret one-man grand jury?

Assuming, for the sake of argument, that the proceedings of the Honorable Gerald W. Groat sitting as a one-

man grand jury or as a "one-man investigation" are proper and constitutional, Petitioner contends it still was necessary for the said grand juror-investigator to make some showing that the books and records sought to be produced were material to the inquiry.

Section 17219 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) provides:

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

Petitioner contends that there is nothing in the petition for the Order to Show Cause other than to the effect that "said books and records referred to in said subpoena contained material and necessary evidence to aid the Honorable Gerald W. Groat, sitting as a One-Man Grand Jury, in making an investigation and in determining whether or not any of the crimes or violations alleged in the petition for the said One-Man Grand Jury have been committed." This is but a conclusion of fact and has no supporting evidence of any kind either in the petition itself or the testimony at the hearing. The screened excerpts of the questions and answers before the Honorable Gerald W. Groat sitting as a one-man grand jury-investigator, upon which the petition for the order to show cause was based, is likewise silent as to the materiality of such records. It is the claim of the petitioner that this procedure on the part of

the prosecuting attorney and the grand jury-investigator comes squarely within the ruling in the case of *In re William Oliver*, decided by this Court in the October, 1947 term; 92 L. Ed. 490.

The conviction of the petitioner in the case at bar is based upon petitioner's alleged contumacious conduct. The court cites his reasons for finding the petitioner guilty, as follows:

> "Because by your actions you have delayed for more than a month the proceedings before this grand jury;
> "Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;
> "Because you refused to obey the order of this Court."

The petition upon which the Order to Show Cause was issued, in paragraphs 6, 7 and 8, gives as the reasons for citing the petitioner for contempt, the refusal to produce the books and records as commanded by the subpoena and the conduct of the said Morrison T. Wade in refusing and neglecting to produce the records, and his attitude and conduct in answering questions. The excerpts of the questions and answers upon which the Order to Show Cause was issued show that much was testified to which was left out in the petition for Order to Show Cause. In other words, it is the claim of the Petitioner that in the case at bar, the conviction of the Petitioner was based upon secret proceedings upon which there has been no open hearing in Court and in consequence thereof the Petitioner was deprived of his liberty without due process of law.

In the *Oliver* case, *supra*, Mr. Justice Black, on pages 495 and 496, said:

> "Many reasons have been advanced to support grand jury secrecy. See, e.g., Hale v. Henkel, 201 U. S. 43, 58-66, 50 L. Ed. 652, 659-662, 26 S. Ct. 370; State v.

Branch, 68 N. C. 186, 12 Am. Rep. 633. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

"Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment, or both."

In the case at bar, the statement of the court clearly indicates that he did not know whether the books and records were material. We quote from the Record, page 50, as follows:

"Mr. Davidow: If your Honor please, give us the assurance that your attaches will not call upon anybody whose name appears in the book receivable or payable.

"The Court: I can't do that, because I don't know what we are going to find when we find them. That is what we have been trying to do during this whole inquiry."

The petitioner purged himself of contempt by delivering the disputed records demanded by the grand jury.

It is the claim of the petitioner that the only reason he was cited for contempt was his failure to produce certain books and records of his private enterprises. This claim is supported by the petition upon which the Order to Show Cause is based. Exhibit 3 (13-17), and the transcript of testimony (24-57). The isolated excerpts in the petition have reference only to the petitioner's refusal to deliver certain books and records. The transcript of the testimony shows that when counsel for petitioner requested an opportunity to bring in witnesses in behalf of the petitioner, the court ordered counsel to proceed with the showing (50-53).

As appears on page 51 of the transcript, the Court said:

"I don't know, I know what has happened in this Grand Jury, and I have heard all the testimony and these records will have to be brought in or he will be held in contempt of court. That is all there is to it."

Thereupon the petitioner stated to the court that he was willing to turn over all the books and records and after that had been arranged for, the Court stated:

"You are not through with the contempt"——

and on page 53:

"Then we will continue on with the other part of the contempt." (53)

and we quote from page 53:

> "Mr. Davidow: Is Your Honor going to pass upon our—will Your Honor give us an opportunity of putting in our proofs as we wish to?
>
> "The Court: Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't they don't testify."

In the case of *In re Oliver, supra,* Mr. Justice Black reviews the provisions of the Michigan so-called one-man grand jury law in reference to the duty of witnesses to testify, and on pages 494 and 495, said:

> "Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than one hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within its discretion then decides to commute or suspend his sentence."

Section 17219 Compiled Laws of the State of Michigan for 1929 (Section 28.946 Michigan Statutes Annotated) provides:

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court; Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

It seems abundantly clear that the intent and purpose of this section, as stated by the United States Supreme Court in the *Oliver* case, is that a witness may purge himself of the contempt by appearing and answering the questions. In the case at bar, however, petitioner did deliver the books and records requested, but the trial court found him guilty of contempt of court nevertheless, and disregarded the fair inference of the statute.

> Petitioner contends that the Honorable Gerald W. Groat, sitting as a one-man grand jury, was not sitting as a court.

The petition upon which the Order to Show Cause for contempt was based is entitled in the proceeding upon which the calling of the grand jury was founded. The petition itself sets forth that the proceedings involved are those of the Honorable Gerald W. Groat acting as a one-man grand jury. The provision of Section 17219 Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) is the only provision covering contempts on the part of witnesses appearing before a grand jury.

If the Honorable Gerald W. Groat was acting as a one-man grand jury, then he was limited by the statute governing grand juries and could cite for contempt only under that statute and for the reason therein set forth, which is (Sec. 28.945 Mich. Statutes Annotated *supra*):

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry . . . ."

The petitioner in the case at bar did not refuse to appear in spite of the fact that the service of the so-called subpoena was not properly served and was not even a subpoena of any court or grand jury. He did not refuse to answer any questions.

The general statute governing proceedings for contempts is covered by Section 13910 Compiled Laws of the State of Michigan for 1929 (Sec. 27.511 Michigan Statutes Annotated, *et seq.*). The very first sentence reads:

> "Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, and no others:" • • •
>
> "1. Disorderly, contemptuous, or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority."

If the Honorable Gerald W. Groat was acting as a grand juror, then certainly he was not sitting as a court. This would seem to be elementary, particularly in view of Section 13886 Compiled Laws of the State of Michigan for 1929 (Section 27.464 Michigan Statutes Annotated) which provides:

> "The sittings of every court within this state shall be public, and every citizen may freely attend the same."

There is no question but that the Honorable Gerald W. Groat was not sitting as a court at the time of the alleged contumacious conduct. The statute expressly provides under what circumstances courts may adjudge persons guilty of contempt. The only statute which has reference to contumacious behavior or conduct is paragraph 1 of Section 13910 Compiled Laws of the State of Michigan for 1929, *supra,* and that covers conduct during the court's sitting. There is nothing in the statute which covers the conduct of any witness appearing before a grand jury except Section 28.945 Michigan Statutes Annotated, and the latter statute gives as the only reasons "neglecting or refusing to appear in response to summons or to answer any questions which may be material to such inquiry." In the case at bar there is no showing of any kind in the petition for the Order to Show Cause upon which petitioner should have been guilty under the statute.

In the case of *In re Briggs,* 178 Mich. 28, contempt proceedings were had against respondent for disobedience of an injunction. The Court, on pages 36 and 37, said:

> "This was a special statutory proceeding. It is well settled in this State that the circuit courts, in chancery, though in ordinary cases of equity cognizance courts of general jurisdiction, must, as to such special proceedings, be considered as courts of special and limited jurisdiction, and no presumption of jurisdiction should be indulged, as in suits at common law, or ordinary suits in equity, in courts of general jurisdiction. All the necessary facts to confer jurisdiction must therefore affirmatively appear upon the record.
>
> "The doctrine is well stated in Brown on Jurisdiction, at page 17, in the following language: 'If a court or tribunal pronounces a judgment it has no authority to grant, or one outside of the issues made and before the court for determination, then such

judgment in excess of the power conferred is void as to such excess of its powers.'

• • • • • • •

"The order being void, disobedience thereof is not punishable."

In the case of *In re Mead*, 220 Mich. 480, police officer Jesse Mead was adjudged guilty of contempt of the Recorder's Court of the City of Detroit for refusing to obey an order signed by Edward J. Jeffries, Judge of the Recorder's Court. Mead gave as reason for refusing that the order was void. The Michigan Supreme court upheld him and stated that the matter was not in the Recorder's Court, that there was neither complaint, warrant or arrest thereon, and that the judge was without jurisdiction to take the bond and to make the order, and on page 483, said:

"The order being a mere nullity, the police officer was under no duty to obey it." • • •

"One may not be held in contempt for disobedience of an order or command which the court had no jurisdiction to make."

In the case at bar, the so-called subpoena, while entitled in the Recorder's Court, commands the petitioner Morrison T. Wade to appear before the Recorder's Court of the City of Detroit "there to give evidence before the Honorable Gerald W. Groat, sitting as a one-man investigation of certain crimes in the city of Detroit." The subpoena does not even recite that the witness is to appear before the Honorable Gerald W. Groat sitting as a one-man grand jury. The proceeding had become a criminal investigation, although the petition upon which the Order to Show Cause was based refers to the proceedings as a one-man grand jury. In either event the judge was not sitting as a court. He was conducting either a one-man grand jury or a criminal investigation.

Petitioner contends that the Honorable Gerald W. Groat sitting as a grand jury had pre-judged the respondent.

The exhibits in the Transcript of Record (9-24) clearly show that the proceedings upon which Morrison T. Wade was found guilty are comparable to the proceedings in the *Oliver* case, *supra.*

In the case at bar the appearance of Morrison T. Wade before the Honorable Gerald W. Groat occurred after the decision in the *Oliver* case, *supra.* The prosecuting attorney thereupon went through the formality of filing a petition upon which an order to show cause was based, to have the petitioner cited and punished for contempt of court, disregarding the plain, unambiguous condemnation of such procedure by the Supreme Court of the United States contained in the *Oliver* case. The record clearly shows that while the petitioner was cited for contempt for failure to produce the books and records and having purged himself of that contempt by bringing in the books and records, nevertheless was found guilty of contempt of court for alleged contumacious behavior although there was no record or showing of any kind of any contumacious behavior. The Honorable Gerald W. Groat sitting as a judge of the Recorder's Court on the contempt charge referred to the fact that he had heard all of the testimony as a grand juror and then went on to say (56):

"You have acted throughout with studied contempt of the authority of this Court and of its process. You have contumaciously proclaimed your right to dictate to the Court the conditions upon which the Court may inspect the said books and records for the purposes of the inquiry being conducted by the Court. You have failed to obey the Court order and have announced that you will not obey.

"In addition, you forbade Oliver Fluke, the bookkeeper for these organizations, to produce these records, although, according to your testimony yesterday, some of these records could not be produced yesterday because he has the only keys to the vaults or places of safekeeping in which they were kept.

"These actions on your part were contumacious and you are in contempt of Court for the following reasons:

"(1) Because by your actions you have delayed for more than a month the proceedings before this Grand Jury;

"(2) Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;

"(3) Because you refused to obey the order of this Court.

"In your testimony yesterday you offered to produce the records desired and today you have produced them. By these actions you have purged yourself partially but not wholly of this contempt. This Court cannot permit witnesses to dictate when and under what circumstances they shall obey its processes."

In other words, the petitioner was apparently found guilty of something that may have occurred during the secret hearing of the grand jury. Whatever it was, was certainly not made public in the petition upon which the Order to Show Cause was based. Petitioner was given no opportunity to defend himself because there is nothing in the petition which could apprise him wherein his conduct was contumacious, assuming that the grand jury had the right to punish him for contempt on the basis of conduct or behavior. The proceedings were based on selected excerpts taken from the petitioner's testimony before the so-called one-man grand jury.

In the *Oliver* case, *supra,* Mr. Justice Black, on pages 500 and 501, L. Ed., said:

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 129 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat (U.S.) 204, 5 L. ed. 242, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id. 6 Wheat (U.S.) at 231, 5 L. ed. 248. And see Re Michael, 326 U. S. 224, 227, 90 L. ed. 30, 32, 66 S Ct. 78.
>
> • • • • • • •
>
> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or

explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority before the public.' If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out.

"The facts shown by the record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. *Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public.*

5

Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court upon an incomplete record made up of excerpts taken from testimony before a "one-man" grand jury, without a complete record and without permitting him to testify and have witnesses testify in his behalf?

In the case at bar, the petitioner will be deprived of his liberty without due process of law if the conviction is permitted to stand because petitioner was limited by the court in presenting his defenses.

On page 53 of the Transcript of Record, the following transpired:

"Mr. Davidow: Is Your Honor going to pass upon our—will Your Honor give us an opportunity of putting in our proofs as we wish to?

"The Court: Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't they don't testify."

In the case of *In re Oliver, supra,* this Court, on page 500, said:

"We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge, namely, a contempt of court, committed, the State urges, in the Court's actual presence."

In the case at bar, the petitioner was not given an opportunity to present witnesses in his behalf. Petitioner was not advised in what respect his conduct may have been contumacious. The excerpts of the testimony before the so-called grand jury failed to disclose in what manner the conduct of the petitioner was contumacious. Petitioner respectfully submits that his conviction of contempt under the circumstances is based upon the secret proceedings of the so-called one-man grand jury investigation, and that

his conviction is actually just as much an "in camera" proceedings as the proceedings in the *Oliver* case.

Conclusion

Petitioner respectfully submits that unless Certiorari is granted and his conviction of contempt and punishment by the Honorable Gerald W. Groat is set aside, he will be deprived of his liberty and property without due process of law for the reasons set forth in his Petition.

The record shows that petitioner was not given an opportunity to know what he was being charged with other than refusal to deliver certain books and records, and he was refused the opportunity to produce witnesses in his behalf. He was not confronted with any witnesses against him, and the court proceeded to find him guilty of contempt, although such action was beyond the jurisdiction and power of the court so to do.

Mr. Justice Black in the *Oliver* case, *supra,* on page 502, said:

> "Nor is there any reason suggested why 'demoralization of the court's authority' would have resulted from giving the petitioner a reasonable opportunity to appear and offer a defense in open court to a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts. The practice that has always been followed with recalcitrant grand-jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of the courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other testimony to be perjurers, have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense.

> The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'
>
> "It is the 'law of the land' that no man's life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers *v.* Florida, 309 U. S. 227, 236, 237, 84 L. ed. 716, 721, 722, 60 S. Ct. 472. The petitioner was convicted without that kind of trial."

Mr. Justice Rutledge, in concurring in the decision in the *Oliver* case, *supra*, said: (Page 503)

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the right 'to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' It takes away the security against being twice put in jeopardy for the same offense and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal. U. S. Const. Amend. Five and Fourteen."

Petitioner respectfully submits that the Statutes complained of (Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929, the so-called one-man grand jury law) are a violation of the Fourteenth Amendment to the Constitution of the United States. Your petitioner respectfully submits that the record of the proceedings abundantly shows that the action of the Court sitting as a one-man grand jury, denies the petitioner and other

citizens of the State of Michigan, a Republican form of government, in violation of Section 4 of Article IV, of the Constitution, and deprives him of his liberty and property without due process of law and the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The record shows that the decisions of the trial court and the Supreme Court of the State of Michigan are not in accord with the applicable decisions of this Court, particularly in the case of *In re Oliver, supra.*

Respectfully submitted,

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(9729)

In the

Supreme Court of the United States

October Term, 1948

No. 453

MORRISON T. WADE, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for writ of certiorari to the Recorder's Court of the City of Detroit, Michigan.

Brief opposing Petition for Certiorari

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I

Opinion of Court Below[*]

The only opinion to which reference can be made, was rendered (55-57) on the 10th day of June 1948, when, at the close of appropriate proceedings had in open court,[1]

[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

[1] The contempt proceedings here in question, unlike those in In re Oliver, 333 U.S. 257, were held in open court following due notice; and the petitioner, unlike Oliver, was represented by counsel.

the petitioner was adjudged guilty of contempt. It is noteworthy, we think, that in such opinion the judge of the court below did not pass upon any federal question, nor was he urged to do so. The Supreme Court of the State of Michigan filed no opinion when they denied (58) petitioner's application (1) for leave to appeal,[2] nor did they necessarily decide a federal question.

II

Counter-Statement concerning Jurisdiction

The jurisdiction of this Court is invoked by petitioner under § 1257 (3), Title 28, United States Code, as revised in 1948, which so far as pertinent provides that "final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court: . . . (3) by certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States".

Petitioner urges, pp. 7-10, that the Court should take jurisdiction on two grounds, each of which, we think, may successfully be disputed:

First: It is suggested that during certain proceedings in the court below which culminated in an adjudication

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[2]

In Michigan, applications for leave to appeal to the Supreme Court, are heard as motions and decided ordinarily without opinion. Mich. Court Rule No. 60, Sec. 7.

finding the petitioner guilty of contempt, the validity of Michigan's "One-Man Grand Jury Act", so-called, was drawn in question on the ground of its being repugnant to the Constitution of the United States [3] (1) because it violates the guarantee to citizens of the State, of a "republican form of government", Federal Constitution, Art. IV, § 4; and (2) because it denies due process and equal protection of the law, as guaranteed by the Fourteenth Amendment.

Our Answer:

(a) The motion (Ex. 5, pp. 18-23) to dismiss the order (Ex. 4, pp. 17-18) to show cause why petitioner should not be "held in contempt and punished therefor", barely averred in the most general language possible, that the act thus "drawn in question" violated the constitutional guarantees aforesaid, but did not specify in what manner the petitioner was affected thereby.[4]

---

[3]

It should be noted at the outset that the term "One-Man Grand Jury" is merely a descriptive phrase to designate a judicial officer who, under authority of the act, examines witnesses and, if justified, issues a warrant for the arrest of an accused person. In re Slattery, 310 Mich. 458. He does not indict, but merely performs the judicial function of instituting a criminal proceeding. Mich. Code of Criminal Procedure, chap. 7, §§ 3-6, incl.; 4 Mich. Comp. Laws 1948, §§ 767.3–767.6; Mich. Stat. Ann. (Henderson) §§ 28.943, 28.945, 28.946 and Mich. Stat. Ann. 1947 Cum. Supp. § 28.944, as amended.

[4]

The first and second grounds asserted by petitioner in his motion (18) to quash and dismiss the order to show cause, are merely that the "One-Man Grand Jury Act", so-called, violates the due process clause and the equal protection clause of the 14th Amendment, and Art. IV, § 4, of the Constitution of the United States.

(b) The record fails to show that petitioner urged the court below to find that the statute violated the Constitution of the United States, or that the court passed upon its validity. And the transcript of the hearing in open court (24-58) indicates no discussion of the federal question.

(c) The federal question here raised, possesses no substance.

Second: Petitioner also *seems* to contend, although this is not quite clear, that in the proceedings below, a right, privilege or immunity was specially set up or claimed for him under the Constitution of the United States, in that (1) his conviction of contempt of court "without his being permitted to have witnesses in his behalf" amounted to no proper hearing, and (2) that his conviction of contempt of court "after having produced the books and records required", was a denial of due process under the Fourteenth Amendment.

Our answer:

(a) In the petitioner's motion (Ex. 5, pp. 18-23) to dismiss and quash the order to show cause, no title, right, privilege or immunity was specially set up or claimed for him under the Constitution of the United States.

(b) At no point in the transcript of testimony taken at the hearing on the order to show cause (Ex. 6, pp. 24-58), or in the colloquy between court and counsel on that occasion, did the petitioner or his counsel set up or claim such title, right, privilege or immunity under the Constitution of the United States; nor did he at any time claim that the court had denied

him a federal constitutional right by refusing to permit him to have witness in his behalf; nor did he at any time assert that his conviction of contempt of court "after having produced the books and records required" was a denial of due process under the Fourteenth Amendment.

(c) There is no substance to petitioner's claims: he was not denied the right to have witnesses in his own behalf; and although he finally produced the required books and records, this did not relieve him of the charge of contempt in refusing to produce them when they were first demanded.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in petitioner's summary statement:[5]

1. If, as petitioner asserts, p. 2, this case challenges the *power* of the judges of the State of Michigan, to perform the duties imposed upon them by the act here in question, or to punish for contempt in such proceedings, then the question presented is non-federal.[6]

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[5] Supreme Court Rule No. 27, par. 4.

[6] It is important to note that in discussing the power of Michigan judges, as defined in the statute involved, and in other acts of the Michigan legislature, counsel for petitioner cites Michigan authority.

2. Since, in our view of the matter, petitioner's summary statement, pp. 2-7, is insufficient, we take the liberty of supplying in chronological order the course of procedure followed in the court below:

a

The subpoena duces tecum, service thereof.

1948,

May 5, the *subpoena duces tecum* to which petitioner refers, p. 3, was issued (Ex. 2, p. 12) out of and under the seal of the recorder's court of the city of Detroit, in the name of the presiding judge. It was delivered to petitioner's attorney, in the office of his law firm, the same afternoon. Petitioner was present in the office at the time and saw the delivery of the subpoena to his attorney.

During the hearing and taking of testimony, much time was devoted to the question whether the subpoena had been properly served on petitioner (24-29; 33-38), but it was not disputed that petitioner appeared before the judge who was sitting as a one-man grand jury, on the 6th day of May, 1948, and he did not bring with him any of the records listed in the subpoena (7).

b

Contempt Proceedings, and Motion to Quash and Dismiss.

May 7: An assistant prosecuting attorney filed in the court below a petition (Ex. 3, pp. 13-17) alleging *inter alia* that the petitioner had disobeyed the foregoing subpoena by refusing "to produce the books and records called for"

thereby, and by refusing and declining "to produce any of the said books and records . . . as commanded by the said subpoena" (14). The petition also alleged that during the session of the grand jury conducted by Judge Groat, "the said Morrison T. Wade, having appeared pursuant to said subpoena, was questioned as follows:", and it proceeded to quote certain questions and answers (14-17) pertinent to the refusal of the petitioner (witness) to produce the documents listed in the subpoena. The petition further alleged (17):

> "That the conduct of the said Morrison T. Wade in refusing and neglecting to produce the books and records as required by the said *subpoena duces tecum*, and his attitude and conduct in answering questions put to him before the Grand Jury and by the Grand Juror, were contumacious and in contempt of court".

Thereupon, in accordance with the prayer of the petition, an order (Ex. 4, pp. 17-18) issued out of and under the seal of the court below, signed by Judge Groat (18), commanding that "Morrison T. Wade appear before this court on the 12th day of May, A.D. 1948, 10:00 a.m., to answer as to why he should not be held in contempt of court and punished therefor, for his conduct as set forth in the petition attached hereto".

May 26: Counsel is correct in stating, p. 4, that he filed a motion (Ex. 5, pp. 18-23) to dismiss the order to show cause, but it is important to note that such a motion was filed approximately 19 days after the order to show cause issued.

The contents of the motion also are important, for with the exception of paragraphs I, II, and III thereof, no constitutional or federal questions were raised by petitioner.

Paragraph I thereof merely asserts that "the so-called one-man Grand Jury law (citing it) . . . is unconstitutional in that it violates the 14th Amendment to the United States Constitution", and counsel then quotes at length the due process and equal protection clauses of the Amendment.

Paragraph II alleges that the act is "in violation of Section 4 of Article IV of the Constitution of the United States, guaranteeing a republican form of government to all the States and the citizens thereof".

And paragraph III raises a non-federal question, claiming that the act "violates Section 2 of Article IV of the Constitution of the State of Michigan" (19).[7]

The remaining paragraphs of the motion to dismiss (19-23), raise no federal questions, and do not even mention the Constitution of the United States.

It is said, p. 4, that the motion to dismiss "came on to be heard before Judge Groat, also acting as the one-man grand jury, who denied the motion, and proceeded to the hearing on the order to show cause for contempt". But the record is silent on what transpired if and when the motion to dismiss was argued and denied. The journal entry of June 9, 1948, a certified copy of which appears as Appendix "A", this brief, recites that on that date "a motion to dismiss the order to show cause . . . is now heard by the court, in part. Thereupon it is ordered by the court that further hearing on said motion be continued until the tenth (10th) day of June, 1948". The journal entry of June 10, 1948,

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[7]

Art. IV, § 2, Mich. Const. 1908 provides: "No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

Appendix B, this brief, recites that upon conclusion of hearing on the order to show cause, the petitioner is adjudged guilty of contempt, and sentenced therefor; and a stay of proceedings is granted. But there is nothing in the record of such proceedings to show that the petitioner urged upon the court consideration of any federal questions.

c

Hearing in Open Court.

We cannot accept as sufficient petitioner's statement, pp. 4-7, of the substance of the proof taken in open court upon the hearing on the order to show cause (24-58).

Walter Stapleton (24-25) and **Thomas Turkaly** (25-27), police officers of the city of Detroit, testified in relation to the service of the *subpoena duces tecum* in the office of petitioner's counsel.[8]

Morrison T. Wade, the petitioner, took the stand in his own behalf and testified at first (27-30) concerning the service of the subpoena in the office of his counsel, the substance of such testimony being that the subpoena was not served upon him and that it was handed to his counsel in his presence. On cross-examination (29-30) he admitted he heard the word "subpoena" used and that he came over to court the following day in response thereto. The assistant prosecuting attorney then proceeded to inquire whether, when he came over to the court of Judge Groat, he had

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[8]

It is a fair inference from this and other testimony, that throughout the proceedings from the moment the subpoena was served, to the final order of the court, petitioner had the benefit of advice of counsel of his own choice.

claimed that he had been illegally served with the subpoena. His answers, which we respectfully invite the Court to read (30-33), were quite evasive, and they need not be repeated here.

Following the testimony (33-38) of one of petitioner's counsel, who related her version of the circumstances surrounding the service of the subpoena, petitioner was further cross-examined and asked the following question (39):

> "Q. So that when you . . . came over here and were asked if you had been subpoenaed and you said that you had in Mr. Davidow's office, you had an opportunity at that time to raise any question as to the impropriety of the service, hadn't you?"

The Court is invited to read such cross-examination (39-43), which was conducted by the assistant prosecutor in an effort to obtain a direct answer to the foregoing question, and to draw their own conclusion as to whether the witness was deliberately evasive. The essence of petitioner's testimony on this subject, was that during the course of his examination when called before Judge Groat, by said subpoena, he did not claim the service of the subpoena had been improper, because the first thing he said when he sat down (43) that morning was that he did not waive any of his legal or constitutional rights; and he thought such an opening statement covered the claim that he had not been properly served.

During examination of this witness (45), the prosecutor referred to petitioner's motion to dismiss, paragraph 15, which reads as follows (22):

> "That contrary to the assertions made in Paragraph 7 (of the petition for order to show cause), the excerpts

quoted are fragmentary, incomplete, selective, and, in at least one instance, false; that the tenor sought to be conveyed by the excerpts presented is wholly false".

Defense counsel then complained that petitioner's statement (to the effect that he did not intend to waive any of his legal or constitutional rights) was omitted from the petition; and that asterisks appearing therein indicated that considerable testimony had been left out (46). He also directed attention to the following questions and answers appearing in the petition:

"**A.** Mr. Groat (referring to the judge)—

Q. (by the prosecutor) Judge Groat to you, Mr. Wade.

A. He is not sitting in the capacity of a Grand Jury. However, in due respect to him I will be glad to call him Judge" (15).

And, challenging their correctness, he stated (47) that what the witness actually said was that "He (Judge Groat) is *now* (instead of "not") sitting as a Grand Jury".

The Court ruled (48) that "on this one question we have had here, the motion to dismiss the order to show cause is denied".

Counsel for petitioner requested the court to produce the reporter "to make available the transcript of the entire testimony" taken on the occasion when petitioner refused to produce the books and records named in the *subpoena duces tecum*. He also stated (49-50) he wished to bring in other witnesses.

After considerable argument, during which it may be noted there was no insistence upon federal constitutional rights as such, the petitioner was recalled to the stand; he testified (52) he was perfectly willing to turn (over) to the judge all of the books and records "you want that I have" by Friday morning (two days hence). They could not, he said (53), be produced that afternoon because of the temporary absence of a Mr. Fluke who had the keys to the safe. It was thereupon agreed that the books and records would be produced the following morning and the case would be adjourned until 9:30 a.m.

Counsel inquired if opportunity would be afforded him to put in further proof, and the court informed him that if he brought in the proper witnesses "and the court deems it advisable, I will let them testify. If you don't, they don't testify. Nine-thirty tomorrow morning. Have all the records here" (53).

When court convened the morning of June 10th, counsel stated (53-54), among other things, that the books and records demanded were in an automobile nearby, and he requested assistance of court aides to bring them up, but for the purpose of the record he added:

> "We would like to say very definitely that these records are being turned over under protest, not conceding or admitting the right of the court to have possession of the same".

Whereupon, after further discussion concerning a check of the books and records, and a receipt for the same, the court found the petitioner guilty of contempt (55-57) and sentenced him (57) to pay a fine of $100, or serve 30 days

in the county jail. A stay of proceedings was granted pending application to the Supreme Court of Michigan for leave to appeal.

We cannot accept the intimation, petition, p. 5, that petitioner was denied the privilege of putting in proofs; the order to show cause (17) was issued on the 7th day of May; motion to dismiss was not filed until the 26th day of May; and the hearing was held on the 9th and 10th days of June, 1948. Our position is that counsel had ample opportunity to produce necessary witnesses without the further adjournments which he requested; and we shall argue that testimony bearing on the materiality of the records and books called for by the subpoena was irrelevant.

And we invite the Court's attention to the fact that the final paragraph of petitioner's summary statement, pp. 6 and 7, refers to matters wholly outside the record. We respectfully submit it should be disregarded.

IV

The Argument.[9]

I

Is the so-called one-man grand jury act of Michigan,[10] a violation of the 14th Amendment to the Constitution of the United States?

The contention here, petitioner's brief, p. 14, seems to be that the so-called one-man grand jury act violates the 14th Amendment because the proceeding of the so-called one-man grand jury "is not a court proceeding"; it is a grand jury under the statute, "and the judge acting as the grand jury does not function as a judge, but as a grand juror", and counsel cite

In re Oliver, 333 U.S. 257.

One answer to such a contention is that a judge examining witnesses pursuant to Michigan's Code of Criminal Procedure, performs the judicial function; that his examination of witnesses leads to the issuance of a warrant, fol-

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[9]

For convenience we follow the order of argument set forth in petitioner's brief.

[10]

Michigan Code of Criminal Procedure, chap. 7, §§ 3–6, incl.; Vol. 4, Mich. Comp. Laws 1948, §§ 767.3–767.6; Mich. Stat. Ann. (Henderson) §§ 28.943, 28.945, 28.946, and Cum. Supp. 1947 § 28.944, as amended.

lowed by a preliminary examination before a presiding magistrate, and he does not "indict",

In re Slattery, 310 Mich. 458; certiorari denied, 325 U.S. 876;

Slattery v. MacDonald, 151 F. 2d 326; certiorari denied, 327 U.S. 814.

The situation in the case at bar does not bear the faintest resemblance to that of *Oliver, supra.* Here, the contemner was given due notice of hearing and had over a month to prepare his defense; and he was represented by counsel of his own choice. We respectfully submit that the *Oliver* case does not apply.

Moreover, as we have noted in our counter-statement concerning jurisdiction, this question was not urged in the court below.

2

Does the so-called one-man grand jury act deny a citizen the republican form of government?

A short and complete answer to petitioner's contention is that questions arising under Article IV, § 4, of the Constitution of the United States "are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts",

Ohio ex rel. Bryant v. Akron Metro. Park District, 281 U.S. 74, 80, and cases cited.

Counsel attempt to connect Art. IV, § 4, of the Constitution of the United States, and its guarantee of a republican

form of government, with the doctrine of the separation of the powers of government, a political philosophy with which our courts have no quarrel,

> *Local 170, Transport Workers Union of America v. Circuit Judge*, 322 Mich. 332,

but we fail to see how it may be applied to the case at bar.

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself",
>
> *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612.

Or, as Mr. Justice Harlan said for the Court in an earlier case, *Dryer v. Illinois*, 187 U.S. 71, 84:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process clause prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty".

And, speaking for the Court, Mr. Chief Justice Hughes said:

> "A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority",
>
> *Crowell v. Benson,* 285 U.S. 22, 57.

3

Are the proceedings of a so-called one-man grand jury a denial of due process and equal protection of the laws?

(a) It is urged, brief, pp. 20-24, that in the one-man grand jury, the officer (the judge) is attempting to function in a judicial capacity and as a grand juror which is a non-judicial function.

This is not a federal question. See authorities cited in answer to petitioner in question 2, *supra.* This Court, according to such decisions, will not concern itself with questions involving the separation of powers of government by a State. We merely note that the authorities cited by petitioner are either Michigan cases or decisions of this Court involving federal statutes.

Moreover, if the question was ever raised in the court below, petitioner contended (19) that the act violated provisions of the State Constitution, § 2 of Article IV.

(b) It is urged, brief, pp. 25-30, that a judge of the recorder's court of the city of Detroit has no jurisdiction

under the laws of the State of Michigan to initiate criminal proceedings. And counsel cites and quotes the language of several Michigan statutes in an effort to sustain his contention.

Our position is that this is a non-federal question, and that it was not raised as a federal question in the court below.

4

Is it a denial of due process to convict a person of contempt of court for alleged misconduct before a judge acting as a secret one-man grand jury?

Under this heading, counsel contend, brief, pp. 30-36, that before petitioner could be compelled to produce the books and records listed in the subpoena, it was necessary for the judge to make some showing that they were material to the inquiry. And again, Michigan law is cited, raising questions for consideration of the State courts.

Our first answer is that this was not raised as a federal question in the court below, for the petitioner did not specially set up of claim any "title, right, privilege or immunity . . . under the Constitution . . . of . . . the United States".

And there is no substance to the claim, for it is a general rule that immateriality of evidence sought to be elicited cannot justify the petitioner's refusal to produce the books,

> Dangel, Contempt, § § 307, 308, and authorities there cited.

A point is sought to be made of the fact that at the close of the hearing on the charge of contempt, the petitioner purged himself thereof by producing the books, and it is suggested that the court thereby lost jurisdiction to punish for contempt. But the course of proceedings before the judge who sat to examine witnesses pursuant to chap. 7, § § 3-6, of the Code of Criminal Procedure, was delayed for over a month by petitioner's stubborn refusal to obey the *subpoena duces tecum*, and that such a contempt should not go unpunished. In any event, whether it should or should not be ignored by the judge of a court of record, is a non-federal question.

It is next contended that the judge was not sitting as a court, but that is mere repetition, and the questions raised, brief, pp. 36-39, are strictly non-federal.

Nor is it a federal question, brief, p. 40, whether the judge "pre-judged" the petitioner; that is a question of fact, and, we respectfully submit, there is sufficient evidence on the face of the hearing transcript, to justify the conclusions drawn by the judge. The petitioner, we respectfully submit, was contumacious even in his answers given on that occasion. It is sufficient to note, we think, that the witness refused to produce the books and papers demanded, and that such refusal continued for a period of approximately 35 days.

5

Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court upon an incomplete record made up of excerpts taken from testimony before a "one-man grand jury", without a complete record and without permitting him to testify and have witnesses in his behalf?

As framed by petitioner's counsel, the question admits of but one answer, controlled by the *Oliver* case; but counsel are mistaken in their premises.

The petitioner was not convicted on an incomplete record: he had a hearing in open court on a very narrow issue, *viz.*, whether he had disobeyed the subpoena, and the petition (13-18) set forth sufficient allegations of fact to advise the accused of the nature of the charge.

He was not denied the privilege of testifying as a witness in his own behalf; the bulk of the transcript of hearing is devoted to such testimony.

And he was not denied the right to produce witnesses; had proper witnesses been produced, and if their testimony proved relevant, the court would undoubtedly have heard them; that, we think, was the intent of the ruling (53).

In any event counsel did not raise the federal question now presented, when he moved for adjournments, or when he requested opportunity of putting in certain proofs. And in his application for leave to appeal to the Supreme Court of the State of Michigan, he assigned no federal ground

for reversal, other than those set forth in paragraph IV, (a) and (b). He did not, in such application, specially set up or claim any right under the Constitution of the United States.

V

Conclusion.

We, therefore, respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

Stephen J. Roth,
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent

Appendixes

Appendix "A"

Clerk's Certificate—Recorder's Court

Form C of D—46-CE

THE RECORDER'S COURT OF THE
CITY OF DETROIT

STATE OF MICHIGAN,
COUNTY OF WAYNE,
CITY OF DETROIT } ss.

I, E. Burke Montgomery, Clerk of the Recorder's Court of the City of Detroit, do hereby certify that the foregoing is correctly taken and copied from the original record in the case of One Man Grand Jury vs. Morrison T. Wade, Case No. 49945 now remaining in my office, and of record in said Court, and that the same has been examined and compared by me with the original of said record in said cause, and that it is a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Detroit, this 3rd day of February in the year one thousand nine hundred and forty-nine.

E. Burke Montgomery,
Clerk.

At a session of the Recorder's Court of the City of Detroit, held in and for said City, at the court room of said court, on Wednesday the 9th day of June in the year of our Lord nineteen hundred and forty-nine.

Present, HON. JOHN J. MAHER, Recorder of the City of Detroit, HON. JOSEPH A. GILLIS, PAUL E. KRAUSE, ARTHUR E. GORDON, O. Z. IDE, CHRISTOPHER E. STEIN, GEORGE MURPHY, GERALD W. GROAT, W. McKAY SKILLMAN, JOHN P. SCALLEN, Judges of the Recorder's Court.

HONORABLE JOHN J. MAHER, Presiding Judge of the Recorder's Court of the City of Detroit.

BEFORE JUDGE GERALD W. GROAT

ONE MAN GRAND JURY
VS. Misc. 49945
MORRISON T. WADE

Order to show cause why respondent should not be held to be in Contempt of Court.

William P. Long, counsel for the People
Larry S. Davidow, counsel for the respondent

In the above matter, a motion to dismiss the order to show cause, filed in the above entitled cause, is now heard by the Court, in part. Thereupon it is ordered by the Court that further hearing on said motion be continued until the tenth (10th) day of June, 1948.

Read, corrected and signed
in open court

JOHN J. MAHER
Recorder

STATE OF MICHIGAN,
County of Wayne,
City of Detroit. } ss.

I, E. BURKE MONTGOMERY, Clerk of the Recorder's Court of the City of Detroit, do hereby certify that the foregoing is correctly taken and copied from the original record made in said cause now remaining in my office, and of record in said court, and that the same has been examined and compared by me with the original of said record in said cause, and that it is a correct transcript therefrom, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, this 3rd day of February in the year one thousand nine hundred and forty-nine.

[SEAL]

E. Burke Montgomery,
Clerk.

Appendix "B"

Clerk's Certificate—Recorder's Court

Form C of D—46-CE

THE RECORDER'S COURT OF THE
CITY OF DETROIT

STATE OF MICHIGAN,
COUNTY OF WAYNE,
CITY OF DETROIT } ss.

I, E. Burke Montgomery, Clerk of the Recorder's Court of the City of Detroit, do hereby certify that the foregoing is correctly taken and copied from the original record in the case of One Man Grand Jury vs. Morrison T. Wade, Case No. 49945 now remaining in my office, and of record in said Court, and that the same has been examined and compared by me with the original of said record in said cause, and that it is a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Detroit, this 3rd day of February in the year one thousand nine hundred and forty-nine.

E. Burke Montgomery,
Clerk.

At a session of the Recorder's Court of the City of Detroit, held in and for said City, at the court room of said court, on Thursday the 10th day of June in the year of our Lord nineteen hundred and forty-nine.

Present, HON. JOHN J. MAHER, Recorder of the City of Detroit, HON. JOSEPH A. GILLIS, PAUL E. KRAUSE, ARTHUR E. GORDON, O. Z. IDE, CHRISTOPHER E. STEIN, GEORGE MURPHY, GERALD W. GROAT, W. McKAY SKILLMAN, JOHN P. SCALLEN, Judges of the Recorder's Court.

HONORABLE JOHN J. MAHER, Presiding Judge of the Recorder's Court of the City of Detroit.

BEFORE JUDGE GERALD W. GROAT

IN THE MATTER OF THE CONTEMPT OF COURT

By one Morrison T. Wade Miscellaneous No. 49945

William P. Long, counsel for the People
Larry Davidow, counsel for Morrison T. Wade

Hearing on an order to show cause why the said Morrison T. Wade should not be held to be in Contempt of Court, having been concluded in open court, the Court now adjudges the said Morrison T. Wade guilty of Contempt of Court and the same Morrison T. Wade is now sentenced by the court to pay a fine of Fifty ($50.00) Dollars and costs of Fifty ($50.00) Dollars or in default thereof to be committed to the Wayne County Jail and therein confined for a term of thirty (30) days.

Thereupon the Court grants a stay of sentence for ten (10) days within which to perfect an appeal to the Supreme Court and it is hereby ordered by the Court that the bail

for said defendant be fixed at One thousand ($1,000) Dollars with one (1) good and sufficient surety pending an appeal to the Supreme Court in said matter.

Read, corrected and signed
in open court

JOHN J. MAHER
Recorder

STATE OF MICHIGAN,
County of Wayne,
CITY OF DETROIT. } ss.

I, E. BURKE MONTGOMERY, Clerk of the Recorder's Court of the City of Detroit, do hereby certify that the foregoing is correctly taken and copied from the original record made in said cause now remaining in my office, and of record in said court, and that the same has been examined and compared by me with the original of said record in said cause, and that it is a correct transcript therefrom, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, this 3rd day of February in the year one thousand nine hundred and forty-nine.

[SEAL]

E. Burke Montgomery,
Clerk.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 453

MORRISON T. WADE,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE RECORDER'S COURT OF THE CITY OF DETROIT

LARRY S. DAVIDOW and
ANNE R. DAVIDOW,
Attorneys for Petitioner,
3210 Book Tower,
Detroit 26, Michigan.

UNIQUE PRESS, 2932 Canfield, Detroit 12, Mich.—TE. 5-1088

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 453

MORRISON T. WADE,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE RECORDER'S COURT OF THE CITY OF DETROIT

Now comes MORRISON T. WADE, petitioner, and represents unto this Honorable Court as follows:

That he makes this petition in pursuance of Rule 33 of the Rules of the Supreme Court of the United States as amended, for a rehearing of his petition for a Writ of Certiorari.

That he believes that the denial by this Court of his application for Writ of Certiorari in the above entitled cause was based upon a misapprehension of the facts brought about by the erroneous impression created by the brief of the Solicitor General of the State of Michigan filed in the above entitled cause. That in his brief there appeared re-

peatedly the misstatements of fact, viz., that no Federal constitutional questions were raised in the lower court and that no constitutional questions were urged or argued and therefore were not passed upon by the lower court.

Petitioner further shows that the record clearly shows that Federal constitutional questions were raised. These Federal constitutional questions appear in the motion to dismiss (R. 18-19). They were argued, as appears by the Record, page 47, and the affidavit of the attorney for petitioner marked Exhibit A hereto attached and made a part hereof, and that part of the transcript relating to the argument of the Federal constitutional questions in the motion to dismiss, which is marked Exhibit B hereto attached and made a part hereof. The trial court did not grant the motion to dismiss, and proceeded to hear testimony on the question of lack of proper service claimed by the petitioner.

Petitioner further says that counsel for petitioner did raise, urge, and argue the Federal constitutional questions, as appears by the record (page 47), the affidavit of counsel, and the transcript, supra.

Petitioner further says that he has been informed that it is not the usual practice to include in the transcript of the record the argument of counsel on legal questions; that it is considered sufficient to make the statement that the legal questions were argued, which procedure was followed in the case at bar.

Your petitioner further shows that the record abundantly supports his contention that the proceeding of contempt against him was a violation of his constitutional rights in that it sought to deprive him of his liberty or property without due process of law and denied him the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution.

Petitioner further shows that practically all of the abuses complained of in the case of *In Re Oliver* were present in the instant case except the formality of going through what later proved to be an idle ceremony, the filing of a petition for an order to show cause and a so-called open hearing.

Petitioner further says that the transcript of what transpired in the secret hearing upon which the so-called contumacious behavior was predicated was not made available to petitioner.

Petitioner further shows that the Solicitor General sought to create, with evident success, the impression that the Federal constitution questions were not raised or argued in the lower court by repetitious misstatements to that effect.

Petitioner further shows that in view of the repeated erroneous assertions thus made, it would appear that this Court has been misled.

Petitioner further says that he believes that a gross miscarriage of justice will result unless this petition for a rehearing is granted and the Court is given an opportunity to pass upon the Federal constitutional questions raised.

WHEREFORE, petitioner prays that a rehearing of his petition for Writ of Certiorari be granted in order that the Federal constitutional questions properly before this Court may be considered upon the merits.

And your petitioner will ever pray.

MORRISON T. WADE,
Petitioner,
LARRY S. DAVIDOW and
ANNE R. DAVIDOW,
By LARRY S. DAVIDOW,
Attorneys for Petitioner.

CERTIFICATE

LARY S. DAVIDOW, attorney for the petitioner, MORRISON T. WADE, does hereby certify that the foregoing petition for rehearing is presented in good faith and is not made for the purpose of delay.

LARRY S. DAVIDOW

EXHIBIT A

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney of record for the petitioner, MORRISON T. WADE, in the above entitled cause, and that he makes this affidavit in support of the petition for rehearing.

Deponent further says that he personally argued the motion to dismiss in the Recorder's Court for the City of Detroit, a copy of which motion is a part of the Record in this case; that this deponent not only raised, but discussed and argued the Federal constitutional questions described in paragraphs 1 and 2 of said motion (R. 18, 19), citing applicable law including the case of *In Re Richardson* decided by the New York Appellate Court, the opinion of which Court was written by Mr. Justice Cardozo; and that the Assistant Prosecuting Attorney for the County of Wayne argued in opposition to said motion.

Deponent further says that following the extensive argument made by this deponent and that of the Assistant Prosecuting Attorney for Wayne County in opposition thereto, before the Honorable Gerald W. Groat of the lower court, said Honorable Gerald W. Groat did not grant such

motion, but proceeded to take testimony on the matter of service, also raised in the motion to dismiss.

Deponent further says that the argument made by this deponent before the said Honorable Gerald W. Groat was stenographically transcribed, but was not made a part of the printed record because it never occurred to this deponent that the Attorney General or Solicitor General would state or reiterate any claims in conflict with the indisputable facts as disclosed by the record; that the Court calendar referred to in the Brief of the Solicitor General (p. 26) clearly discloses that the motion to dismiss was argued; that the transcript of what occurred the following day also discloses that the motion to dismiss had been argued and that specifically the Federal constitutional questions had been raised (R. 47).

Deponent further states that a reading of the Solicitor General's Brief indicates a studied effort to create the erroneous impression that the Federal constitutional questions had been neither raised nor argued in the lower court; that repeatedly there appear in the Solicitor General's Brief, statements pointing up the spurious claim that the Federal constitutional questions were neither raised, argued nor disposed of by the lower court (pp. 2, 4, 9, 12 and 15), whereas in fact and in truth the Federal constitutional questions had been raised and argued and adversely decided to the petitioner's rights by the lower court.

Deponent further says that the form of motion to dismiss filed in behalf of petitioner in the recorder's Court of the City of Detroit was in accordance with the rules and practice of said Recorder's Court.

Deponent further says that the Solicitor General who wrote the Brief was not present at the hearing on said mo-

tion to dismiss and therefore can not have any personal knowledge as to what transpired in the lower court, and that whatever the Solicitor General has said on this subject is based upon assumptions not supported by the Record or the facts.

Deponent further says that in the preparation of the record in the above entitled cause, deponent was familiar with the rule or practice concerning brevity in both the record and brief; that in accordance with such understanding, deponent was of opinion that the transcript of the oral argument made on the motion to dismiss before the lower court, in which Federal constitutional questions were raised, would not be desirable or deemed necessary by this Court; that this deponent believed that it was sufficient to state that these Federal constitutional questions had been raised, argued and disposed of in the lower court (R 1, 48); that this deponent did not anticipate that the established and indisputable fact that Federal constitutional questions had been so raised in a written motion and had been so orally argued in the lower court, would be disputed, let alone that allegations to the contrary would be made by the Solicitor General in his Brief.

And further deponent saith not.

LARRY S. DAVIDOW

Subscribed and sworn to before me
this 10th day of March, A. D., 1949,
NELL M. YORGEN,
Notary Public, Wayne County, Michigan
My commission expires December 9, 1949

EXHIBIT B

STATE OF MICHIGAN—In the Recorder's Court for the City of Detroit

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. MORRISON T. WADE, Defendant.	Miscellaneous No. 49945

Proceedings had and testimony taken in the above entitled cause before Honorable Gerald W. Groat, Judge of the Recorder's Court, in the City of Detroit, Michigan, on June 9 and June 10, 1948.

Appearances: Mr. William P. Long, and Mr. Edwin W. Scott, Assistant Prosecuting Attorneys, appearing on behalf of the People. Mr. Larry S. Davidow, appearing on behalf of the defendant.

Burton E. Hawn, Reporter

The Clerk: Hearing on order to show cause in the matter of Morrison T. Wade.

The Court: Have you got the file?

Mr. Davidow: If Your Honor please, we have filed a motion to dismiss which will take considerable time to discuss. In the event of an adverse decision, we should like to have the opportunity of subpoenaing witnesses and making a showing—

The Court: We will arrive at that point right after we hear the motion.

Mr. Davidow: Very well, Your Honor.

Our motion, if Your Honor please, to dismiss this order to show cause states twenty specific reasons. The first reason is that the so-called One-man Grand Jury law, being Section 28.943 et sequi, of the Compiled Laws of the State of Michigan for 1929, is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution, which states, among other matters: "No person shall be deprived of his life, liberty or property without due process of law, and no person shall be denied the equal protection of the laws."

It is our position, Your Honor, that—perhaps I better couple that with the second reason, because they run together and being provisions of the United States Constitution which we are convinced are violated by the law under which this Court is now acting.

The second reason is, that it is in violation of Section 4 of Article 4 of the Constitution of the United States, guaranteeing a Republican form of government to all the states and the citizens thereof. I think that we have argued this matter in some measure, at least before Your Honor on an order to show cause involving Mr. Paul Westerkamp. That matter is now under, being held under advisement by Your Honor, and you have indicated that a decision will be forthcoming on the 16th of this month.

I am wondering as I stand here before the Court whether or not it might be well to have this discussion held in abeyance pending Your Honor's decision in that Westerkamp case, because very frankly, in the event that Your Honor decided adverse to us, it would obviate in any event, adverse or in our favor, it would obviate the necessity of arguing some of these questions which have already been raised before you, and the disposition of which, if favorable to Mr. Westerkamp, would certainly put an end to this

particular proceeding. I am just wondering what is Your Honor's reaction to that suggestion.

The Court: We will hear this matter this morning.

Mr. Davidow: Very well. I do not have with me, Your Honor, at the moment the decision of the United States Supreme Court in that Oliver case, but we think that is applicable to the case at bar on the question of the violation of the Fourteenth Amendment to the Constitution of the United States, on Section 40 of Article 4 of the Constitution. We would like to direct Your Honor's attention to the facts.

This so-called One-man Grand Jury Act—perhaps I may call Your Honor's attention to the fact that our motion was prepared originally before the consummation of the examination before Judge Maher in the case of the People vs. Morrison T. Wade. Our motion was finished and completed previous to the decision of Judge Maher, which was, I assume, predicated in some measure upon the brief filed by the Prosecuting Attorney, in which the Prosecuting Attorney insists that this hearing before Your Honor is not a One-man Grand Jury at all, insists it is a judicial inquiry. Now, I would like to direct Your Honor's attention to the fact that the original petition filed—I wonder whether we could have that file brought in here, Your Honor.

The Court: Certainly. Where is it?

Mr. Davidow: The original petition filed by the Attorney General and the Prosecuting Attorney.

The Court: We have it right here.

Mr. Davidow: The file, Your Honor, upon the face of it, it is entitled, "In the matter of the petition on behalf of the One-man Grand Jury," and the order below on file shows on February 3, 1948, one-man Grand Jury granted, Judge Gerald W. Groat to preside.

Now, the petition itself is entitled, "Petition for One-man Grand Jury." After making certain recitations, it recites a prayer for relief of three parts; the second one particularly to which I direct Your Honor's attention, reads as follows: "B. Wherefore your petitioners pray that the necessary procedure be taken to designate and appoint in accordance with the statutes and rules of court in such cases made and provided, one of this Court to conduct said One-Man Grand Jury inquiry and investigation pursuant to the statute in such case made and provided."

In the order, which I presume—if I am incorrect, I think Your Honor can very well correct me. In the order which I presumed was prepared by Mr. McNally and Mr. Black, we have this language and Your Honor signed it.

"James N. McNally,"—this is dated February of this year and the order is entered for granting a petition for a One-man Grand Jury. "James N. McNally, Prosecuting Attorney of Wayne County, and Eugene F. Black, Attorney General of the State of Michigan, having on the 3rd day of February, 1948, filed a petition in this court praying that a One-man Grand Jury investigation and inquiry be ordered and that one of the judges of this Court be designated to conduct such investigation for the reason set forth in said petition," and so on, and then comes the order of the Court following that recitation: "It is ordered that said petition for a One-man Grand Jury be and the same is hereby granted, and it is further ordered," and then Your Honor is designated as the Grand Juror or Grand Jury.

Now, I think Your Honor will take judicial notice of what occurred before Judge Maher. In the rush of coming here I did not bring with me the copy.

The Court: I couldn't take judicial notice of everything that happened before Judge Maher. I was there a few minutes.

Mr. Davidow: If Your Honor, please, will bear with me for a moment, I want to make that statement preliminary to that observation.

In that brief, and perhaps we can get that file here now, that will obviate any necessity on my part to rely on my recollection, in that brief filed by the Prosecuting Attorney, they denied that this was a Grand Jury proceeding, and Judge Maher evidently persuaded by that brief, similarly held that it is not a Grand Jury proceeding at all, so that Your Honor functions in the anomalous position where obviously the Prosecuting Attorney is blowing hot and cold depending upon the temperature he thinks is best suited for him for the purpose of persuading the Recorder's Court judges to initiate this inquiry. They describe it as a One-man Grand Jury and Your Honor led to believe that he is acting as a One-man Grand Jury, and then when we confront them with some obvious deficiencies which are fatal to what this so-called One-man Grand Jury has been doing, then they change their tune and say, "It is not a Grand Jury at all."

Mr. Long: That isn't what I said.

Mr. Davidow: You will have your chance to make your speech.

Mr. Long: You are playing with words and wasting time.

Mr. Davidow: I am not playing with words and wasting time.

The Court: Let us not have colloquy, let us proceed.

Mr. Davidow: I would like to, if I may.

Now, we contend, Your Honor, that a so-called judicial inquiry that is not in the nature of a Grand Jury is absolutely null and void so far as instituting this proceeding. Either this is a Grand Jury or it is not. If it is not, it has no validity of any kind whatsoever. If it is a Grand Jury,

then it is bound by certain minimum requirements that the law has set up, requirements which are unrecognized. Judge Maher, in his opinion, makes the observation, which is exactly the same as made by the Prosecuting Attorney in his brief. I read now, if Your Honor please, from page 4. There is some interesting observations that Judge Maher makes that Your Honor may find desirous of becoming familiar with later on, but this is the pertinent part to the argument I am making at this time.

On page 4, the last paragraph, Judge Maher's opinion reads as follows: "Great stress is laid on the fact that Judge Groat, the Grand Juror, did not take an oath to function as a Grand Juror, also that a Judge of the Recorder's Court cannot act as a Grand Jury citing Section 28.949 of Michigan Statutes Annotated (Section 17223 of C.L. of 1929) and Jasnowski vs Connelly, 197 Michigan, 257. Counsel confuses our sixteen to twenty-three man Grand Juries with our so-called one-man Grand Jury and the provisions of the respective acts creating said tribunals. The former can only be presided over by a Circuit Judge, it has county-wide jurisdiction, its members must take an oath (Section 28.949 of Michigan Statutes Annotated) and warrants and indictments issue after a true bill is voted. The one-man Grand Jury, which is provided for in Sections 28.943 and 28.944, Michigan Statutes Annotated, is a different body or instrument."

Here is the pertinent language. "It is not a Grand Jury at all, although so-called. It is a special statutory investigation by a judge or a justice. There are no provisions in said Act requiring the Grand Juror, whether he be Circuit Judge, Recorder's Court Judge, or Justice of the Peace, to take an oath separate and distinct from the one taken when said party qualifies as a judge at the beginning of his term," and so on.

The point I make, Your Honor, is that the Prosecuting Attorney, having been caught in a condition, a position from which there was no escape, if this were a Grand Jury, shifted his position altogether and denied that it is a Grand Jury. If this is not a Grand Jury, Your Honor, then the order made by this Court is utterly null and void. The petition is wholly without force and the whole proceeding is nugatory, invalid, a farce.

We come to the question of due process of law, Your Honor, which is protected under the Fourteenth Amendment to the Constitution of the United States, and I want to say this, if Your Honor please, and I want Your Honor to believe me in what I do say, nothing of any kind is intended as offensive to this Court for whom I entertain respect and opinion. The history of this country of ours necessarily involves the consideration of fundamental rights. It is something not to be talked about, not merely to school children on the fourth of July. It is something to be revered, read and respected, and honored, every day of our lives, and Your Honor well knows how the American colonies rebelled against the tyranny of Britain because, among other reasons, men were being denied the right to a fair trial in the vicinity where the alleged, rather, the offense was supposed to have been committed, taken three thousand miles across the hostile land away from their friends, their neighbors and counsel of their own choosing. In other words, if Your Honor please, the revolutionary forefathers realized that no matter what the good intentions might be, there were certain minimum requirements that had to be observed or else freedom would be no more, and that is the reason why the Fourteenth Amendment was subsequently adopted after an experience which brought about the Civil War, that no person could be deprived of his life, liberty or property without what the law calls due process of law,

and that seemingly means that insofar as criminal matters are concerned, there are various requirements leading to the arrest of a person which must be honored and observed.

In this State you can have a person arrested under one of two circumstances, either upon a complaint from which a warrant issues, or upon which a warrant issues, or an inductment upon which a warrant issues. This Court and no Court, and I do not speak disrespectfully when I say this, has the right to cause the arrest of any person without due process of law, and the issuance of an order to show cause in this case without the requirement of a Grand Jury being observed, namely, first, that the Grand Jury must be sworn, and, secondly, the case of a charge, that an indictment must be made or filed. True, we are confronted here only with an order to show cause, but I say, if Your Honor please, that this Court is without authority to issue an order to show cause for the reason that not sitting as a Grand Jury, the petition having been filed for a Grand Jury, the order having been signed for a Grand Jury, that this Court cannot function at all, because merely making a judicial inquiry does not create the power upon which an order to show cause may be issued. Either this is a one-man Grand Jury which is bound by the law applicable to grand juries, namely, that before a Grand Jury can begin its work it must be sworn, and this obviously has not been done here, or not being a Grand Jury, being merely a judicial inquiry. Then this Court has no power to cite for contempt. I do not want to labor the point that I argue before Your Honor before in the Westerkamp case, but I do want to briefly direct Your Honor's attention to what I consider to be the outstanding case that has to do with what I believe is a mistake, a tragic mistake, a mistake of which Your Honor has been a victim. It is a mistake which I think experience is showing is bad, namely, the attempt to place upon the shoulders of a judge the duties of an inquisitor. That has

never worked, it cannot work because the work of an inquisitor is altogether different than the work of a judge. This Court should be respected, this Court should be considered impartial and fair, no matter what the circumstances are, and this Court cannot labor in that atmosphere of fairness when it has been imposed upon in an attempt to act as an inquisitor with all of the evil influence that can flow from such an assignment. This Court is obliged to assume responsibility for acts that are done without the knowledge of this Court and which I am sure this Court would never lend himself to if brought to his attention.

I want to read again, if Your Honor please, these words of Justice Cardozo in which, in my opinion, it sets forth what the law is and which I think Your Honor should follow. There is a great deal more to life, Your Honor, than permitting one's self to be carried along the wave of what seems to be popularity. It is something about doing one's duty, and I am calling upon this Court to do his duty in a brave, resolute way, and I know that while the Michigan Supreme Court indicated that it was not persuaded by the logic and the reason and the law stated by Justice Cardozo in the Slattery case, yet what the Supreme Court of the United States did in the Oliver case might create the basis of suggesting that this Court in raising the issue properly can start a chain of circumstances that may persuade our Michigan Supreme Court to change its position likewise. As a matter of fact, Judge Maher, a colleague of yours, has said something which indicates that public opinion, as well as the opinion of lawyers and judges, is changing definitely on the question of the so-called one-man Grand Jury, because on page 3, this is what Judge Maher had to say in his opinion. I know it has no compelling effect upon Your Honor, but I think as one of your colleagues you are interested in what he said.

The Court: We respect our colleague, Mr. Davidow, and every other Judge in Michigan and also the United States Supreme Court.

Mr. Davidow: Yes, Your Honor. I think I fairly say that Your Honor is not obliged to follow the same legal opinion that one of your associates made. You may differ on different points. This is what Judge Maher said, on page 3. "Although there are many features as to practices and procedure, relative to the so-called one-man Grand Jury of Michigan which courts, bar associations, legislators and even portions of the general public may not favor or endorse, the law creating the same has yet to be declared unstitutional." I say, Your Honor, it is significant that one of your colleagues should voluntarily and gratuitously state an opinion of that kind upon the official records of this Court which suggests, I believe, if Your Honor please, that the attitude by judges, by lawyers and by the public toward the one-man Grand Jury, so-called, is definitely changing and changing in a way adverse to the law.

Now, in that familiar Richardson case which, as Your Honor may recall, is reported in 247 New York 401; 160 N.E. 655, Justice Cardozo, speaking for what is the Supreme Court of New York, it being called the Appellate Court, said this, and I hope if you will, Your Honor, that these words will so fix themselves in your mind and heart that you will have no hesitancy in doing what I believe is your clear, probable duty. Justice Cardozo said this: "The function of the judge is to determine controversies between litigants * * *. They are not adjuncts or advisers, much less investigating instruments of other agencies of government." * * * "The statute,"—Justice Cardozo is describing the New York statute which is very similar to the one here,—"The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently

amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the District Attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to waken that tradition by any judgment of this Court."

A few more words, what I believe is a statement of the law which this Court can properly confirm and accept and state in his opinion. Justice Cardozo went on to say: "The policy at the root of the constitutional prohibition reinforces this conclusion."

Now, that is the provision compatible to ours in our State Constitution that I shall direct Your Honor's attention to in a moment.

"The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties. Some of these possibilities find significant illustration in the very cases before us now. Here is an inquiry which has already separated the respondent for more than two months from the discharge of his judicial duties, and which is likely to continue for many weeks to come."

Parenthetically, Your Honor, in this matter, and this is the nineteenth week, the fifth month, and when it will end we do not know. Whether Your Honor knows, I cannot say. Continuing: "The charges as first submitted involved a scrutiny of the acts of the accused official in multifarious transactions for fifteen years or more. Supplemental charges have now been filed with the result that the issues are more involved than ever."

Parenthetically, this was supposed to have started as an inquiry into three specific charitable organizations. The matter that brings us before Your Honor today involves two private corporations that have nothing to do with these so-called charitable organizations except that Mr. Morrison T. Wade, the Managing Director of the Society of Good Neighbors,—

The Court: Isn't that a misstatement, three charitable organizations?

Mr. Davidow: Your Honor is right, except that Mr. McNally, that same day, publicly stated—

The Court: Mr. McNally is not the Grand Jury.

Mr. Davidow: No, but, Your Honor, he is the attorney for the Grand Jury, and that is why I come back in the petition, he is acting as your attorney. I said before, Your Honor, that I regret that under the circumstances you are given credit and there is placed upon your shoulders the responsibility for what these people say and do involving the so-called Grand Jury. Mr. McNally said, in the public press, as quoted in the newspaper, and I can fetch them over if Your Honor is interested sufficiently in this respect. He said they were intended for three organizations, and he mentions the Society of Good Neighbors, the Northwest Council and the Redford Community War Memorial Association.

Mr. Long: There is no such thing in the newspapers, only three organizations. Mr. Davidow misspoke himself.

Mr. Davidow: Well, if Your Honor please, I stated what Mr. McNally said, and I will bring the papers over if Your Honor is interested, so I say, Your Honor, that Justice Cardozo anticipated and stated what had happened there. We are having the same happen here. I had come to where Justice Cardozo had said, "The great staff of counsel and assistants engaged upon the work is a token of its complexity and its probable duration." I don't know how much we have here, fifteen to twenty or more assistants to the Prosecuting Attorney, attaches and others engaged in this so-called Grand Jury work. Justice Cardozo continues to say, "Interference so prolonged with assignments to judicial duty is the very evil that was meant to be hit by the prohibitions of the Constitution directed against dual office. True indeed it is that there may be times when the duties of a Commissioner"—that is the judge when acting in New York as here as a Grand Juror— "—will be less onerous and protracted. Even so, the nature of the trust must be measured by its reasonable possibilities. Not what has been done under a statute, but what may reasonably be done under it, is the test of its validity."

He goes on to say, does Justice Cardozo, "From first to last, he has assumed to act as judge and nothing else. He has made his return and affidavits as a Justice of the Supreme Court."

The Supreme Court of New York, Your Honor, is like the Circuit Court in the State. It herein entails all that has been issued as a judge sitting as a one-man Grand Jury as a Judge of the Recorder's Court. You will note how applicable is the language of Justice Cardozo.

Continuing: "He has issued his notices and subpoenas with recitals that describe him as a Justice of the Supreme Court, and with the addition of his title as such Justice, he has signed his name thereto. We were informed by his coun-

sel that in case of need he will exercise the power to punish a contumacious witness for a contempt of his authority, though such power does not exist unless the subpoena has been issued by a Justice of the Court (Civil Practice Act, 406). Equivocal acts will be so interpreted as to escape a violation of the constitutional command, and even the risk of violation, when conduct, though permissible, is close to the line of danger. Here the acts are not equivocal. Nothing has been said and nothing has been done with the will to serve in any other capacity than that of a Justice of the Court."

And by their latest admission, the Prosecuting Attorney squirms from one position to another, depending on how the wind blows. If this is not a Grand Jury, if this is a judicial inquiry, then Your Honor is conducting something which he has no right under the recognized and established rules of law to carry on. The Michigan Constitution, Section 2 of Article 4, says this: "No person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in this Constitution," and there isn't a single line, a word or punctuation mark that confers upon the Judge of the Recorder's Court the power or the right to exercise the job of inquisitor, of inquirer, of investigation, whatever name you wish to give it. It is not a judicial function, Your Honor, and we have a decision of the Michigan Supreme Court involving this division of powers, and while this has to do with the activity of a governor, the fact still remains that Justice Cooley in his decision clearly indicated the appropriateness of this constitutional prohibition, and I want to take Your Honor's time to briefly direct your attention to it in the case of Sutherland vs. Governor, 29 Michigan 320, a case which is still the law of this State that has not been modified, that has not been reversed. They said—that was a case in which

the Court was asked to compel the governor to perform a ministerial action. Justice Cooley, speaking for the Supreme Court, said this: "However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our Republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever."

Justice Cooley goes on to say: "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their power alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all three governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

"The Legislature, in prescribing rules for the courts, is acting within its proper province in making laws, while the courts in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of

the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal."

Now, I say, Your Honor, no matter which way you looked at it, an inquiry, an investigation, an inquisition is not a function of the Court. That is for a Prosecuting Attorney or someone of comparable position. It is the executive branch of the government and therefore when the attempt is made to place upon Your Honor's shoulders the job of an inquisitor, it is definitely and completely in violation of the law and without any legal sanctity or justification and in conflict, necessarily, with both the Constitution of the State of Michigan and the Constitution of the United States as I have indicated.

I

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Statutes, Constitutional Provisions and Rules

In the

Supreme Court of the United States

October Term, 1948

No. 453

MORRISON T. WADE, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for writ of certiorari to the Recorder's Court of the City of Detroit, Michigan.

Brief opposing Petition for Rehearing

I

Concise Statement of Matter Involved.*

In our brief opposing petition for certiorari, pp. 2-5, we disputed the only two possible grounds on which pursuant to Title 28 U.S.C. § 1257 (3) counsel might urge the Court to take jurisdiction of this cause:

[*]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

First: With respect to the suggestion[1] that in the court below, the validity of a state statute,[2] had been drawn in question on the ground of its being repugnant to the Constitution of the United States, we replied in substance and effect

(a) that although in his motion to dismiss (Ex. 4, pp. 17-78), the petitioner had averred "in the most general language possible", that Michigan's one-man grand jury law, so-called (note 2), violated certain fundamental rights guaranteed in the Federal Constitution,[3] he did not "specify in what manner the petitioner was affected thereby";[4] and

(b) that the record fails to show that petitioner "*urged*" the court below to find that Michigan's one-man grand jury law was repugnant to the Constitution of the United States, or that the court

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[1]

It was no more than a suggestion, for in quoting from § 1237 (3) of Title 28 U.S.C., Revised, counsel deleted the phrase: "Where the validity of a state statute is drawn in question etc.".

[2]

Mich. Code of Crim. Pro., ch. 7, §§ 3-6; Mich. Comp. Laws 1948, §§ 767.3-767.6; Mich. Stat. Ann. (Henderson) §§ 28.943-28.946.

[3]

Article IV, § 4, guaranteeing a "republican form of government", and the 14th Amendment, guaranteeing due process of law, and the equal protection of the law.

[4]

Petitioner merely asserted (18-19) that (I) "the so-called one-man Grand Jury law (citing it) . . is unconstitutional in that it violates the 14th Amendment to the United States Constitution" and quoted the due process and equal protection clauses; and (II) "that it is in violation of Section 4 of Article IV" thereof, "guaranteeing a republican form of government to all the states and the citizens thereof".

passed upon its validity; and that the transcript (Ex. 6, pp. 24-58) of hearing in open court, indicates no discussion of the federal question".

Second: With respect to the point, not clearly asserted, that in the proceedings below, a right, privilege or immunity was specially set up or claimed for the petitioner under the Constitution of the United States,[5] we answered as follows:

"**(a)** In the petitioner's motion (Ex. 5, pp. 18-23) to dismiss and quash the order to show cause, no title, right, privilege or immunity was specially set up or claimed for him under the Constitution of the United States.

"**(b)** At no point in the transcript of testimony taken at the hearing on the order to show cause (Ex. 6, pp. 24-58), or in the colloquy between court and counsel on that occasion, did the petitioner or his counsel set up or claim such title, right, privilege or immunity under the Constitution of the United States; nor did he at any time claim that the court had denied him a federal constitutional right by refusing to permit him to have witness in his behalf; nor did he at any time assert that his conviction of contempt of court 'after having produced the books and records required' was a denial of due process under the Fourteenth Amendment."

In our counter-statement of the case, brief, pp. 8-9, we pointed out that the record (as settled in the court below) is silent on what transpired if and when the motion to dis-

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[5] Paraphrasing Title 28 U.S.C. § 1257 (3).

miss was argued and denied, and we referred to two journal entries, Appendix A and Appendix B, our brief, from which it appeared that on the 9th day of June 1948, "a motion to dismiss the order to show cause . . . is now heard by the court, in part", and that the hearing was continued to June 10, the following day; and that on the 10th day of June 1948 upon conclusion of the hearing on the order to show cause, the petitioner was adjudged guilty of contempt and sentenced therefor.

> "But (we said, p. 9) there is nothing in the record of such proceedings to show that the petitioner urged upon the court consideration of any federal questions".

Again, on pp. 11 and 12 of our brief, referring to the petitioner's request to produce witnesses (and obtain a further adjournment), we stated, p. 12,

> "After considerable argument, during which it may be noted there was no insistence upon federal constitutional rights as such, the petitioner was recalled to the stand;"

Finally, on p. 15 of our brief, after discussing petitioner's claim that the so-called one-man grand jury act of Michigan (note 2) violates the 14th Amendment, we said:

> . "Moreover, as we have noted in our counter-statement concerning jurisdiction, this question was not urged in the court below".

Petitioner filed no reply to our brief opposing his petition for certiorari, nor did he request such a privilege.[6]

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[6] Counsel for petitioner were most generous in consenting to the enlargement of the time for filing our brief opposing the petition for certiorari. We certainly would not have objected to the filing of a reply brief, or to any extension of time for that purpose.

Counsel now moves for a rehearing (Court Rule 33) of his petition for a writ of certiorari, on the ground that "he believes that the denial by this Court of his application for Writ of Certiorari . . was based upon a misapprehension of the facts brought about by the erroneous impression created by the brief of the Solicitor General of Michigan. That in his brief there appeared repeatedly the misstatements of fact, viz., that no Federal constitutional questions were raised in the lower court and that no constitutional questions were urged or argued and therefore were not passed upon by the lower court".

Our reply:

1. We do not propose to recant any statement in our brief opposing the petition for certiorari, for we relied upon the record as settled and were justified thereby.[7]

2. For present purposes only we are willing to accept as the record of petitioner's argument on the motion to dismiss, the unauthenticated transcript "Exhibit B" attached to the petition for rehearing. Even so, we still insist that the questions there presented were non-federal in their main aspects.

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[7]

Counsel is correct in saying, petition for rehearing, pp. 5-6, that "the Solicitor General who wrote the brief was not present at the hearing on said motion to dismiss and therefore cannot have any personal knowledge as to what transpired in the lower court". We respectfully submit he had a perfect right to rely upon the transcript of record served upon him.

II

The Argument.

Point One

The statements in respondent's brief were based upon the printed transcript of record, and were justified thereby.

Counsel for petitioner, whose good faith we do not question,[8] is slightly mistaken when he states, petition for rehearing, p. 2, we said in our brief "that no Federal constitutional questions were raised in the lower court", for we did not go that far.

As heretofore noted, what we did say in our brief, p. 3, was that "the motion to dismiss . . . barely averred in the most general language possible, that the (one-man grand jury) act . . violated the constitutional guarantees aforesaid (republic form of government and due process), but did not specify in what manner the petitioner was affected thereby", and this is perfectly true (18-19).

Counsel then state, p. 2, that

> "the record clearly shows that Federal constitutional questions were raised. These Federal constitutional questions appear in the motion to dismiss (R. 18-19). They were argued, as appears by the Record, page 47, and the affidavit of the attorney for petitioner

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[8]

Counsel merely errs on the side of overzeal, and we do not choose to consider his attack as personal. We'll be just as good brother officers of this Court as we ever were, when this controversy is ended.

marked Exhibit A hereto attached and made a part hereof, and that part of the transcript relating to the argument of the Federal constitutional questions in the motion to dismiss, which is marked Exhibit B hereto attached and made a part hereof".

As heretofore stated, our complaint was that while such federal constitutional questions were "raised" in petitioner's motion to dismiss, the allegations were not sufficiently specific to require serious consideration.

Nor can we agree that page 47 of the record indicates that such questions were argued. It is true that counsel there referred to "the legal and constitutional questions we have raised"; but this does not necessarily imply that federal constitutional questions were argued. And counsel himself does not seem to rely too heavily upon page 47 of the record for in the next breath he turns to documents strictly "off the record".

Moreover, it does not clearly appear from the record that the court below necessarily decided the Federal constitutional questions so indefinitely raised; and he expressed no opinion, so far as the settled record discloses.

There are at least two further indications that the court below did not necessarily decide a federal constitutional question of substance:

1. The petition for certiorari, p. 2, recites:

"This case challenges the *power* of the judges of the State of Michigan to act as so-called one man grand juries, and their *power* to find persons guilty of contempt of court while acting as one man grand juries".

If, as seems to be the case, the question is merely one of judicial power under the Constitution and laws of the State of Michigan, and if, as counsel contended when arguing his motion to dismiss, the issue is whether the Michigan one-man grand jury law is in violation of "the fundamental principles of division of the powers of State government",[9] then no federal question is involved, and the State Constitution alone controls decision.

2. Again, in counsel's "Statement as to Jurisdiction", petition for certiorari, p. 7, it is said:

> "It is respectfully submitted that the conviction of petitioner of contempt of court *without being permitted to have witnesses in his behalf* amounts to no proper hearing and his conviction of contempt of court after having produced the books and records required was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States . . " [Italics are ours throughout]

We would appreciate the courtesy if counsel for petitioner will point out the pages of the printed transcript of record which indicate that *this* particular federal constitutional question was raised in the court below, or where on the fact of the printed record the petitioner, through his counsel, specially set up or claimed such a federal constitutional right, Title 28, U.S.C. § 1257 (3).

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[9]

Even in his brief in this Court, petitioner so claimed, citing a decision of the Michigan Supreme Court, Local 170, Transport Workers Union of America v. Paul V. Gadola, Circuit Judge, 322 Mich. 332, holding that such fundamental principles are preserved by Art. 4, Sec. 2 and Art. 7, Sec. 9 of the State Constitution of 1908.

At the hearing on order to show cause, after the petitioner had testified (27-33), after other witnesses had been heard (24-27; 33-38), and following colloquy between court and counsel (45-48), counsel for petitioner announced he was "unprepared to proceed" because he had "witnesses to subpoena".

Questioned by the court as to the witnesses desired, counsel proceeded to argue, claiming, among other things, that he should have the full transcript of the proceedings before the grand jury at the time when, it was alleged, the petitioner was in contempt of court (48); and he urged "that it would be manifestly unfair and a mockery of justice for the prosecuting attorney to select excerpts out of the context of all surrounding testimony, those parts which isolated in his judgment will give the indicia of contumacy" (49).

And counsel continued to urge the point (49) and to offer the testimony of certain witnesses.

Finally (52), after considerable discussion, counsel recalled petitioner to the stand, and petitioner testified in effect that he was now willing to produce the books and records desired by the judge.

We respectfully note that throughout the foregoing discussion, not once did the petitioner or his counsel specially set up or claim any right, privilege or immunity under the Constitution of the United States; indeed, the Federal Constitution was not mentioned, nor did counsel cite any decision of this Court.

After the petitioner was adjudged guilty of contempt of court, counsel for petitioner announced (57) he would ap-

peal to the Supreme Court of the State, but he filed no motion for rehearing.

In his application to the Michigan Supreme Court for leave to appeal, the petitioner alleged (1) that "prejudicial error was committed by said court at the trial of said cause, in the following particulars", and he proceeded to set forth (1-4) approximately 16 assignments of such error, numbered (a) to (p), inclusive.

Among such assignments, only two, (a) and (b), specifically raised or attempted to raise a federal constitutional question:

> "**(a)** The so-called one-man grand jury law . . . (citing the statute) . . . is unconstitutional in that it violates the 14th Amendment to the United States Constitution, which states among other matters: (quoting the due process and equal protection clause).
>
> "**(b)** That is is in violation of Section 4 of Article IV of the Constitution of the United States guaranteeing a republican form of government to all the States and the citizens thereof".

Other assignments are purely local in nature, (c) invoking the due process clause of the Michigan State Constitution; (d) challenging the jurisdiction of the judges of the court below to initiate criminal proceedings; (e) questioning the validity of the subpoena duces tecum; (f) claiming that the books and records sought by said subpoena to be produced, were not material as evidence; (g) contending that such books and records were already in possession of the grand jury; (h), presently considered; (i) attacking the jurisdiction of the judge on the ground he

had not taken the oath required of a grand juror; (j) to the effect that petitioner had purged himself of contempt; (k) putting in issue the alleged prejudice of the judge; (l) stating that the judge was not sitting as a court; (m) alleging that the conviction was "contrary to law", (n) that it was contrary to the facts, (o) that there was no showing of contempt, and (p) that the judge had prejudged the respondent.

It was alleged in assignment (h), *supra*,

> "(h) That the petition (Exhibit 3) upon which the order to show cause is based sets forth fragmentary, incomplete and selective portions of what transpired, and therefore is not a fair and proper petition for an order to show cause and conviction thereunder" (3).

But it can scarcely be urged that this statement specially sets up or claims a right, privilege or immunity under the Constitution of the United States.

While in assignment (j), *supra*, the petitioner avers that "the respondent purged himself of contempt by delivering the disputed records demanded by the grand jury", he does not claim that this was a constitutional right protected by the Constitution of the United States; nor does he assign error at all upon the claim, now asserted, that he was denied opportunity to produce the testimony of witnesses in his behalf.

Point Two

The transcript attached to the petition for rehearing, does not clearly indicate a purely federal constitutional question.

In his petition for rehearing, counsel for petitioner goes outside the record certified by the judge of the court below, and considered by the Michigan Supreme Court on application for leave to appeal, to produce and print as "Exhibit B" a transcript of proceedings had upon argument of petitioner's motion to dismiss. Such argument covers approximately 16 printed pages.

Quickly summarized, counsel's argument runs something like this:

Counsel first directed attention to grounds I and II of his motion to dismiss, *viz.*, that the one-man grand jury law violates the due process clause of the 14th Amendment, as well as Art. IV, § 4, of the Constitution, guaranteeing a republican form of government; and he also called attention to the fact that another pending cause involved much the same questions (petition, p. 8).

After mentioning the decision of this Court in the "Oliver Case", *In re Oliver*, 333 U.S. 251, counsel indicated he would discuss the facts in the case at bar, and the law involved.

The points which counsel attempted to make, were these:[10]

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[10]

The points so made are here condensed into our own language, and then are stated as we understand counsel's argument, without trying to quote them.

1. If the judge of the court below who issued the order to show cause, *was* acting as a one-man grand jury pursuant to the act in question, he was without jurisdiction because previous to beginning his work he had not taken the oath of a grand juror which is required by law.[11]

2. If such judge was *not* so acting, but was engaged in the conduct of a "judicial inquiry", as the prosecuting attorney was said to claim (and we are inclined to that view), then the proceedings were invalid on two grounds:

(a) Because (as counsel contended) the petition and order pursuant to which the judge was acting, called for the constitution of a "one-man grand jury" rather than a "judicial inquiry".

(b) Because, under the authority of an opinion written by the late Mr. Justice Cardozo when chief judge of the Court of Appeals of the State of New York, *In re Richardson*, 247 N.Y. 401, 160 N.E. 655, the one-man grand jury act of Michigan permits a person belonging to the judicial department of government to exercise the powers of an "inquisitor", meaning, we suppose, the powers of a person belonging to another department of government.

Thus, we respectfully submit, although counsel clothed his argument in Federal constitutional phrases, such as "due process" and "republican form of government", and

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[11]

Under Michigan law, on those rare occasions calling for the drawing of a traditional 16-member grand jury, the clerk of the court is required to prepare an alphabetical list of all persons returned as grand jurors and to administer to each of them a prescribed oath. Mich. Code of Crim. Proc., chap. 7, § 9; Comp. Laws 1948, § 767.9; Mich. Stat. Ann. § 28.949.

while he paid eloquent tribute to fundamental principles, nevertheless the questions he actually posed were strictly non-federal.

Surely, the claim that the judge should have taken the oath prescribed by law for members of 16-man grand juries, involved merely the construction of the statute in question; and the interpretation of the petition and order under the terms of which the judge conducted the proceedings in the court below, was a matter of local concern.

The opinion of Judge Cardozo *In re Richardson, supra*, 247 N.Y. 401, 160 N.E. 655, involved no federal constitutional question, but held (Syl. 1) that

> "section 34 of the (N.Y.) of the Public Officers Law (Cons. Laws, ch. 47), . . . in so far as it attempts to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial, by making him the delegate of the Governor *in aid of an executive act*, the removal of a public officer, is invalid. There is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably necessary to the fulfillment of judicial duties and the essence of the judicial function may not be destroyed by turning the power to decide into an opportunity to consult and recommend". [Emphasis, ours].

The opinion further held that service by a justice of the Supreme Court as commissioner in removal proceedings under the foregoing section of the act was acceptance of a public trust within the prohibition of section 19 of article 6 of the State Constitution of New York providing that "justices of the Supreme Court shall not hold any other

public office or trust, except that they shall be eligible to serve as members of a constitutional convention".[12]

Not once during the course of his opinion did this learned jurist hold that the New York law violated any provision of the Constitution of the United States.

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[12]

Cf. Mich. Const. 1908, Art. IV, § 2, and Art. 7, § 9; and see Local 170, T.W.U. v. Circuit Judge, 322 Mich. 332.

III

Conclusion

We respectfully submit that petitioner's application for a rehearing of his petition for certiorari should be denied.

Respectfully Submitted,

Stephen J. Roth,
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Edmund E. Shepherd
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Daniel J. O'Hara
Assistant Attorney General

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